Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

WILLIAM WARREN CHAPMAN *ET AL.*,

Petitioners,

—v.—

KING RANCH INC., *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS, AUSTIN, TEXAS

PETITION FOR WRIT OF CERTIORARI

CRAIG S. SMITH
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Counsel for Petitioners

QUESTIONS PRESENTED

1. Are Texas procedures inadequate to determine if relief must be granted from judgments violating the due process clause for, among other things, lack of notice?

2. How much fraud is enough to invalidate a state court judgment on due process grounds?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners are:

(1) William Warren Chapman, III

(2) Marion P. Crane, Individually, and as Next Friend of Rebecca E. Crane, A Minor

(3) Benjamin M. Porter, Individually, and as Next Friend of Calliope I. Porter, and Next Friend of Daniel M. Porter, Minors

(4) John A. Porter, Individually, and as Next Friend of Ellen B. Porter, and Next Friend of John Alexander Porter, Minors

(5) Andrew S. Crane

(6) Sarah P. Crane

(7) Donald B. Austin

(8) Ada Margaret Chapman

(9) Anne Furman Dunn

(10) Cathy Furman Jezek

(11) Blair Furman Jones

(12) Mary Furman Ross

(13) Claire Furman Smith

(14) Meredith Hutchins Dean

(15) Mark Chapman Hutchins

(16) Nancy N. Williams

(17) Edward C. Coker

(18) Helen F. Coker

(19) Lavinia L. Coker

(20) Hannah Carr Coker

(21) Elizabeth Auld Coker

Respondents are:

(1) King Ranch, Inc.

(2) Exxon Corp. a/k/a Exxon Company, USA, a foreign corporation duly incorporated under the laws of the State of New Jersey, qualified to do business in the State of Texas

(3) King Ranch Oil & Gas, Inc., a corporation duly incorporated as such under the laws of the State of Delaware, qualified to do business in the State of Texas

(4) Helen King Kleberg Groves, Individually, and (a) as Trustee for Caroline Randall Alexander under Will of Helen C. Kleberg, and under Trust dated 12-24-56, and (b) as President and Director of the R. J. Kleberg Foundation and Helen C. Kleberg Foundation, and (c) as Trustee of the King Ranch Family Trust, and (d) as a Trustee of the Helen C. Alexander Trust under the Will of Helen C. Kleberg

(5) Caroline Randall Alexander, Individually and (a) as Trustee under the Estate of Robert J. Kleberg, Jr., and (b) as Trustee of the Emory G. Alexander Trust, and (c) as Trustee of the Helen C. Alexander Trust, and (d) as Trustee of the John D. Alexander, Jr. Trust, and (d) as a Trustee of the Henrietta K. Alexander Trust created under the Will of Robert J. Kleberg, Jr., and (e) as a Trustee of the Henrietta K. Alexander Trust created under the Will of Helen C. Kleberg, and (f) as a Trustee of the Helen K. Groves 1981 Grandchildren's Trust, and (g) as a Trustee of the Helen C. Alexander 1981 Trust, and (h) as a Trustee of the John D. Alexander, Jr. 1981 Trust, and (I) as a Trustee of the Caroline R. Alexander 1981 Trust

(6) Dorothy Alexander Matz, Individually, and (a) as Director of the R. J. Kleberg Foundation, and (b) as

Trustee under the Estate of Robert J. Kleberg, Jr., and (c) as a Trustee of the Helen K. Groves 1981 Grandchildren's Trust, and (d) as a Trustee of the Caroline R. Alexander 1981 Trust, and (e) as a Trustee of the Dorothy D. Alexander 1981 Trust

(7) Helen Campbell Alexander, Individually, and (a) as Director of the R. J. Kleberg Foundation, and (b) as a Trustee under the Estate or Robert J. Kleberg, Jr., and (c) as Trustee of the Helen C. Alexander Trust, and (d) as Trustee of the Henrietta K. Alexander Trust, and (e) as Trustee of the Caroline R. Alexander Trust, and (f) as a Trustee of the Helen C. Alexander Trust created under the Will of Robert J. Kleberg, Jr., and (g) as a Trustee of the Helen K. Groves 1981 Grandchildren's Trust, and (h) as a Trustee of the Helen C. Alexander 1981 Trust, and (I) as a Trustee of the Emory G. Alexander 1981 Trust, and (j) as a Trustee of the Henrietta K. Alexander 1981 Trust

(8) Henrietta Kleberg Alexander George, Individually, and (a) as Director of the R. J. Kleberg Foundation, and (b) as a Trustee under the Estate or Robert J. Kleberg, Jr., and (c) as Trustee of the Henrietta K. Alexander Trust, and (d) as Trustee of the John D. Alexander, Jr. Trust, and (e) as a Trustee of the Helen K. Groves 1981 Grandchildren's Trust, and (f) as a Trustee of the John D. Alexander, Jr. 1981 Trust, and (g) as a Trustee of the Henrietta K. Alexander 1981

(9) John Deaver Alexander, Jr., Individually, and (a) as Director of the R. J. Kleberg Foundation, and (b) as Trustee of the Caroline R. Alexander Trust, and (c) as Trustee of the Dorothy D. Alexander Trust, and (d) as Trustee of the Helen C. Alexander Trust, and (e) as Trustee of the John D. Alexander, Jr. Trust, and (f) as Executor of the Estate of Robert J. Kleberg, Jr., and (g) as Trustee under the Estate of Robert J. Kleberg, Jr., and

(h) as Director of the Robert J. Kleberg, Jr. and Helen C. Kleberg Foundation, and (I) as a Trustee of the Helen C. Alexander Trust created under the Will of Robert J. Kleberg, Jr., and (j) as a Trustee of the Emory G. Alexander Trust created under the Will of Robert J. Kleberg, Jr., and (k) as a Trustee of the John D. Alexander, Jr. Trust created under the Will of Robert J. Kleberg, Jr., and (l) as a Trustee of the Caroline R. Alexander Trust created under the Will of Robert J. Kleberg, Jr., and (m) as a Trustee of the Henrietta K. Alexander Trust created under the Will of Robert J. Kleberg, Jr., and (n) as a Trustee of the Dorothy D. Alexander Trust created under the Will of Robert J. Kleberg, Jr., and (o) as a Trustee of the Helen C. Alexander Trust created under the Will of Helen C. Kleberg, and (p) as a Trustee of the Emory G. Alexander Trust created under the Will of Helen C. Kleberg, and (q) as a Trustee of the John D. Alexander, Jr. Trust created under the Will of Helen C. Kleberg, and (r) as a Trustee of the Caroline R. Alexander Trust created under the Will of Helen C. Kleberg, and (s) as a Trustee of the Henrietta K. Alexander Trust created under the Will of Helen C. Kleberg, and (t) as a Trustee of the Dorothy D. Alexander Trust created under the Will of Helen C. Kleberg, and (u) as a Trustee of the Helen K. Groves 1981 Grandchildren's Trust, and (v) as a Trustee of the Helen C. Alexander 1981 Trust, and (w) as a Trustee of the Emory G. Alexander 1981 Trust, and (x) as a Trustee of the John D. Alexander, Jr. 1981 Trust, and (y) as a Trustee of the Dorothy D. Alexander 1981 Trust

(10) Emory Alexander Hamilton, Individually, and (a) as Director of the R. J. Kleberg Foundation, and (b) as Trustee of the Caroline R. Alexander Trust, and (c) as Trustee of the Dorothy D. Alexander Trust, and (d) as Trustee of the Henrietta K. Alexander Trust, and (e) as Trustee under the Estate of Robert J. Kleberg, Jr., and (f)

as a Trustee of the Emory G. Alexander Trust created under the Will of Robert J. Kleberg, Jr., and (g) as a Trustee of the Caroline R. Alexander Trust created under the Will of Robert J. Kleberg, Jr., and (h) as a Trustee of the Dorothy D. Alexander Trust created under the Will of Robert J. Kleberg, Jr., and (I) as a Trustee of the Helen C. Alexander Trust created under the Will of Helen C. Kleberg, and (j) as a Trustee of the Emory G. Alexander Trust created under the Will of Helen C. Kleberg, and (k) as a Trustee of the John D. Alexander, Jr. Trust created under the Will of Helen C. Kleberg, and (l) as a Trustee of the Caroline R. Alexander Trust created under the Will of Helen C. Kleberg, and (m) as a Trustee of the Dorothy D. Alexander Trust created under the Will of Helen C. Kleberg, and (n) as a Trustee of the Helen K. Groves 1981 Grandchildren's Trust, and (o) as a Trustee of the Emory G. Alexander 1981 Trust, and (p) as a Trustee of the Caroline R. Alexander 1981 Trust, and (q) as a Trustee of the Henrietta K. Alexander 1981 Trust, and (r) as a Trustee of the Dorothy D. Alexander 1981 Trust

(11) Peter A. Larkin, Jr., Individually and (a) as Trustee of the Henrietta Kleberg Armstrong Trust of Jean M. Larkin, and (b) as Trustee of the Louise of the Louise L. Larkin Trust

(12) Charles M. Armstrong, Individually, and (a) as Trustee for the 1976 CMA Children's Trust dated 12-29-76, and (b) as Trustee for the 1976 SLA Children Trust dated 12-29-76, and (c) as Independent Co-Executor of the Estate of Henrietta Larkin Armstrong, and (d) as Trustee of the HLA Q-Tip Trust, and (e) as a Trustee of the HLA Non Q-Tip Trust, and (f) as a Trustee of the 1976 CMA Children's Trust A, and (g) as a Trustee of the 1976 CMA Children's Trust B, and (h) as a Trustee of the 1976 HJAJ Children's Trust A, and (I) as a

Trustee of the 1976 HJAJ Children's Trust B, and (j) as a Trustee of the 1976 SLA Children's Trust A, and (k) as a Trustee of the 1976 SLA Children's Trust B, and (l) as a Trustee of the 1980 Coble Armstrong, et al. Trust

(14) Julia A. Partridge (referred to in Plaintiffs' previous petitions as Henrietta Julia Armstrong Jitkoff Partridge), Individually, and as Independent Co-Executrix of the Henrietta Larkin Armstrong Estate, and as (b) Independent Co-Executor of the Estate of Andrew Jitkoff, and as Trustee of the Trust created in the Paragraph "Sixth" of the Last Will and Testament of Andrew Jitkoff, and as (c) a Trustee of the HLA Q-Tip Trust, and (d) as a Trustee of the HLA Non Q-Tip Trust, and (e) as a Trustee of the 1976 CMA Children's Trust A, and (f) as a Trustee of the 1976 CMA Children's Trust B, and (g) as a Trustee of the 1976 HJAJ Children's Trust A, and (h) as a Trustee of the 1976 HJAJ Children's Trust B, and (I) as a Trustee of the 1976 SLA Children's Trust

(15) Stewart Larkin Armstrong, Individually, and (a) as Trustee for the 1976 CMA Children's Trust dated 12-29-76, and (b) as Trustee for the 1976 SLA Children Trust dated 12-29-76, and (c) as Independent Co-Executor of the Estate of Henrietta Larkin Armstrong, and (d) as a Trustee of the HLA Q-Tip Trust, and (e) as a Trustee of the HLA Non Q-Tip Trust, and (f) as a Trustee of the 1976 CMA Children's Trust A, and (g) as a Trustee of the 1976 CMA Children's Trust B, and (h) as a Trustee of the 1976 HJAJ Children's Trust A, and (I) as a Trustee of the 1976 HJAJ Children's Trust B, and (j) as a Trustee of the 1976 SLA Children's Trust A, and (k) as a Trustee of the 1976 SLA Children's Trust B, (l) as a Trustee of the Tom R. Armstrong Successor Trust, and (m) as a Trustee of the Henrietta K. Armstrong Trust

(16) John Barclay Armstrong, Individually, and as (a) Independent Co-Executor of the Henrietta Larkin Arm-

strong Estate, and as (b) Independent Co-Executor of the Estate of Andrew Jitkoff, and as (c) a Trustee of the HLA Q-Tip Trust, and as (d) a Trustee of the HLA Non Q-Tip Trust

(17) Ida Louise Larkin Clement, Individually, and (a) as Trustee of the Tom R. Armstrong Trust under the Will of Henrietta Kleberg Armstrong, Deceased, and (b) as Executrix and Trustee under the Will of Henrietta Kleberg Armstrong, Deceased, and (c) Trustee under Trust dated 11-14-67, and (d) as Trustee of the Tom R. Armstrong Successor Trust created under the Will of Henrietta Kleberg Armstrong, and (e) as Trustee of the Henrietta Kleberg Armstrong Trust created under the Will of Henrietta Kleberg Armstrong, and (f) as Trustee of Trust dated 11-14-67, and (g) in her individual capacity as a partner in the Clement Community Partnership, a Texas general partnership

(18) Alice Kleberg Clement Carrington, Individually

(19) Henrietta Pruyn Clement Hildebrand, Individually

(20) Ida Louise Clement Steen, Individually

(21) James Higbie Clement, Jr., Individually, and (a) as Successor Executor under the Will of James Higbie Clement, and (b) as Successor Trustee under Trust dated 11-14-67, and (c) as Trustee for the Ida L. Clement Marital Trust, and (d) as Trustee for the Clement Q-TIP Trust, and (e) as Trustee for the James H. Clement Family Trust and (f) as Trustee for the Clement Contingent Trusts, and (g) as a partner in the Clement Community Partnership, and (h) as custodian for Capera B. Clement, and (I) as custodian for James H. Clement, III, and (j) as custodian for Gregory S. Clement, and (k) as Trustee under Trust dated 11-14-67, and (l) as Trustee of the Ida

L. Clement Marital Trust in its capacity as a partner in the Clement Community Partnership

(22) Martin Withington Clement, II, Individually, and (a) as Successor Executor under the Will of James Higbie Clement, and (b) as Successor Trustee under Trust dated 11-14-67, and (c) as Trustee for the Ida L. Clement Marital Trust, and (d) as Trustee for the Clement Q-TIP Trust, and (e) as Trustee for the James H. Clement Family Trust and (f) as Trustee for the Clement Contingent Trusts , and (g) as Trustee of the Ida L. Clement Marital Trust in its capacity as a partner in the Clement Community Partnership, and (h) as a partner in the Clement Community Partnership

(23) Leroy G. Denman, Jr., Individually, and (a) as Trustee for Jean Morehead Larkin under Trust 11-14-67, and (b) as Trustee for Louise Lindsay Larkin under Trust dated 11-14-67, and (c) as Trustee for the Peter A. Larkin Residuary Trust under Will of Peter A. Larkin, and (d) as a Trustee of the Helen K. Groves 1981 Grandchildren's Trust

(24) Richard M. Kleberg, III, Individually, and (a) as the Custodian under the Uniform Gift to Minors Act for the benefit of Christopher Kleberg and Adrian Kleberg, and (b) as Trustee of the Richard King, Jr., Trustee for the benefit of the Children of Stephen J. Kleberg, and (c) as Trustee of the Richard M. Kleberg, Jr. Trust for the benefit of the Children of Scott Masterson Kleberg and (d) as Trustee of the Christina Lee Kleberg Trust, and (e) as Trustee of the Oliveanne M. Kleberg Trust, and (f) as Trustee of the Richard M. Kleberg, Jr. Trust for the benefit of the Children of Sally S. Kleberg, and (g) as Trustee of the Richard M. Kleberg, Jr. Trust for the benefit of the Children of Stephen J. Kleberg, and (h) as Trustee of the Richard M. Kleberg, Jr. Trust for the benefit of the Children of Scott M. Kleberg, and (I) as

Trustee of the Christina L. Kleberg Trusted dated December 19, 1986, and (j) as Trustee of the Oliveanne M. Kleberg Trust dated March 8, 1985, and (k) as Trustee of the Richard M. Kleberg, IV Trust dated June 25, 1990.

(25) Stephen J. Kleberg, Individually, and (a) as Custodian under the Uniform Gift to Minors Act for the benefit of Oliveanne Marie Kleberg, Christina Lee Kleberg and Richard M. Kleberg, IV, and (b) as Trustee of the Richard M. Kleberg, Jr., Trust for the benefit of the Children of Richard M. Kleberg, III, and (c) as Custodian under the Uniform Gift to Minors Act for the benefit of Benjamin McKinney Espy and Thomas Kleberg Espy, and (d) as Trustee of the Richard M. Kleberg, Jr. Trust for the benefit of the Children of Scott Masterson Kleberg, and (e) as Successor Trustee for the benefit of the Children of Robert R. Shelton and their descendants dated 7-27-67, and (f) as Trustee for the D. N. Shelton 77-A Trust, and (g) as Trustee for the H.A. Shelton 77-A Trust, and (h) as Trustee for the Katherine Shelton R 77-A Trust, and (I) as Trustee for the R.R. Shelton 1967 Trust, and (j) as Trustee for the R. R. Shelton 1973 Trust, and (k) as Trustee for the R. R. Shelton 77-A Trust, and (k) as a Trustee of the Richard M. Kleberg, Jr., Trust for the benefit of the Children of sally S. Kleberg, and (l) as Trustee of the Richard M. Kleberg, Jr. Trust for the benefit of the Children of Scott M. Kleberg, and (m) as Trustee of the Christopher C. Kleberg Trust dated January 25, 1989, and (n) as Trustee of the Adrian G. Kleberg Trust dated March 11, 1991, and (o) as Trustee for the Robert J. Kleberg Trust dated December 26, 1995, and (p) as a general partner in the Tio and Janell Kleberg Family Partnership, Ltd.

(26) Sally Kleberg, Individually, and (a) as Trustee of the Richard M. Kleberg, Jr. Trust for the benefit of the

Children of Richard M. Kleberg, III, and (b) as Trustee of the Richard M. Kleberg, Jr. Trust for the benefit of the Children of Stephen J. Kleberg, and (c) as Trustee of the Richard M. Kleberg, Jr. Trust for the benefit of the Children of Scott Masterson Kleberg

(27) Scott M. Kleberg, Individually, and (a) as Trustee of the Richard M. Kleberg, Jr. Trust for the benefit of the Children of Richard M. Kleberg, III, and (b) as Trustee of the Richard M. Kleberg, Jr. Trust for the benefit of the Children of Sally S. Kleberg, and (c) as Trustee of the Richard M. Kleberg, Jr. Trust for the benefit of the Children of Stephen J. Kleberg.

(28) Gilbert M. Denman, Jr., Individually, and (a) as Executor for the Estate of Robert J. Kleberg, Jr. and as (b) a Trustee of the Helen C. Alexander Trust created under the Will of Robert J. Kleberg, Jr. and (c) as a Trustee of the John D. Alexander, Jr. Trust created under the Will of Robert J. Kleberg, Jr.

(29) Robert J. Kleberg & Helen C. Kleberg Foundation, a non-profit Corporation

(30) Catherine Manning Hannon Larkin Auchincloss, Individually

(31) Louise Lindsay Larkin (Cutler), Individually

(32) John Adrian Larkin, III, Individually, and as (a) a Trustee of the Louise L. Larkin Trust, and (b) as a Trustee of the Henrietta K. Armstrong Trust created under the Will of Henrietta K. Armstrong

(33) James J. Higginson, Individually, and (a) as Trustee for Kleberg Armstrong Trust for Jean Morehead Larkin under Trust dated 11-14-67, and (b) as Trustee for Louise Lindsay Larkin under Trust dated 11-14-67, and (c) as Trustee for the Henrietta Kleberg Armstrong Trust for Jean M. Larkin dated 12-30-60, under the Will

of Peter A. Larkin, and (d) as Trustee for the Peter A. Larkin Residuary Trust under the Will of Peter A. Larkin

(34) W.B. Yarborough, as the Executor of the Estate of Katherine S. Kleberg Yarborough, Individually (Dec'd)

(35) James Leonard Yarborough, Individually

(36) William B. Yarborough, Jr., Individually

(37) Linda Berkley Yarborough, Individually

(38) Harry M. Whittington, Individually, and (a) as Successor Trustee of the Katherine Berkley Reynolds 1967 Trust, and (b) as Successor Trustee of the Alice Kleberg Reynolds 1967 Trust, and (c) as the Successor Trustee of the Michael Mifflin Reynolds 1967 Trust

(39) Ed R. L. Wroe, Jr., Individually, and (a) as Successor Trustee of the Katherin Berkley Reynolds 1967 Trust, and (b) as the Successor Trustee of the Alice Kleberg Reynolds 1967 Trust, and (c) as the Successor Trustee of the Michael Mifflin Reynolds 1967 Trust

(40) Katherine Berkley Reynolds, Individually

(41) Alice Kleberg Reynolds, Individually

(42) Michael Mifflin Reynolds, Individually

(43) Marvin K. Collie, Individually, and (a) as Trustee of the Alice Kleberg Reynolds 1966 Trust dated 12-7-67, and (b) as Trustee of the Katherine Berkley Reynolds 1966 Trust dated 12-7-67, and (c) as Trustee of the Michael Mifflin Reynolds 1966 Trust dated 12-7-67

(44) Edward Dickens Reynolds, Jr., (a) as Trustee of the 1967 Trust dated 6-28-67 for Katherine Berkley Reynolds, and (b) as Trustee of the 1967 Trust dated 6-28-67 for Michael Mifflin Reynolds and (c) as Trustee for the Alice Kleberg Reynolds 68 Trust, and (e) as Trustee of the Michael Mifflin Reynolds 68 Trust

(45) Louise Cox Reynolds, (a) as Trustee of the 1967 Trust dated 6-28-67 for Katherine Berkley Reynolds, and (b) as Trustee of the 1967 Trust dated 6-28-67 for Alice Kleberg Reynolds, and (c) as Trustee of the 1967 Trust dated 6-28-67 for Michael Mifflin Reynolds and (d) Trustee of the Alice Kleberg Reynolds 68 Trust, and (e) Trustee of the Michael Reynolds 68 Trust

(46) Richard Wells Reynolds, Individually and as Trustee of the Katherine B. Reynolds Trust

(47) Richard Greer Sugden, Individually, and as (a) Trustee for Glenn Edward Sugden under Trust dated 12-06-68, and (b) as Trustee for Katherine Lynn Sugden under Trust dated 12-31-69, and (c) as Trustee for Glenn Edward Sugden under Trust dated 12-30-90, and (d) as Trustee for Katherine Lynn Sugden under Trust dated 12-30-90

(48) Susan Mack Sugden, Individually, and (a) as Executrix of the Estate of Mary Etta Sugden (b) and as Trustee for the May Etta Sugden Trust

(49) Glenn Edward Sugden, Individually

(50) Katherine Lynn Sugden, Individually

(51) Shelton Ranch Corporation, a corporation duly incorporated as such under the laws of the State of Texas with a permit to do business in the State of Texas, with its principal place of business at Kerville, Texas

(52) Belton K. Johnson, Individually

(53) Cecilia H. Johnson (Hagar), as (a) Independent Co-Executrix of the Estate of B.K. Johnson, Jr., and (b) as Trustee of the Trust under Article Six (6) under the Will of B.K. Johnson, Jr., and as (c) a Co-Trustee of the 1970 Trust created under Article four (4) of the Will of B.K. Johnson, Jr.

(54) Carper Capt, as (a) Trustee under Article Six (6) under the Will of B.K. Johnson, Jr., and as (b) a Co-Trustee of the Trust created under Article Six (6) of the Will of B.K. Johnson, Jr., as (c) a Co-Trustee of the 1970 Trust created under Article four (4) of the Will of B.K. Johnson, Jr., and (d) as Trustee of the 1962 Johnson Trust for the benefit of the Children of B.K. Johnson, Jr.

(55) Raymond F. Gaston, III, as Independent Co-Executor of the Estate of B.K. Johnson, Jr.

(56) F. Peter Zoch, III, Individually and (a) as Successor Trustee for the benefit of the Children of Robert R. Shelton and their descendants under Trust dated 7-27-67 and (b) as Trustee for the D. N. Shelton 77-A Trust, and (c) as Trustee for the H.A. Shelton 77-A Trust and (d) as Trustee for the Katherine Shelton R77-A Trust, and (e) as Trustee for the RR. Shelton 1973 Trust, and (f) as Trustee for the RR Shelton 77-A Trust, and (g) as Trustee for the Sarita M. Shelton 1977-A Trust, and as (h) Independent Co-Executor of the Estate of J. Rogers Rainey, Jr., and (I) as Executor of the Estate of Robert R. Shelton, and (j) as a Trustee of the Robert R. Shelton Trusts for the Benefit of the Children of Robert R. Shelton and their Descendants under Trusts dated 7-27-67, and (k) as Trustee of the Robert R. Shelton 1973 Trusts for the benefit of the children of Robert R. Shelton and their Descendants

(57) Kathleen L. Rainey, as Independent Co-Executor of the Estate of J. Rogers Rainey, Jr., who was formerly Successor Trustee for the benefit of the Children of Robert R. Shelton and their descendants under Trust dated 7-27-67 and (a) as Successor Trustee for the benefit of the Children of Robert R. Shelton and their descendants under Trust dated 7-27-67 and (b) as Trustee for the D.N. Shelton 77-A Trust, and (c) as Trustee for the H.A. Shelton 77-A Trust and (d) as

Trustee for the Katherine Shelton R. 77-A Trust, and (e) as Trustee for the RR Shelton 1973 Trust, and (f) as Trustee for the RR Shelton 77-A Trust, and (g) as Trustee for the Sarita M. Shelton 1977-A Trust

(58) Dorothy O'Neal, as Independent Co-Executor of the Estate of J. Rogers Rainey, Jr., who was formerly Successor Trustee for the benefit of the Children of Robert R. Shelton and their descendants under Trust dated 7-27-67 and (a) as Successor Trustee for the benefit of the Children of Robert R. Shelton and their descendants under Trust dated 7-27-67 and (b) as Trustee for the D.N. Shelton 77-A Trust, and (c) as Trustee for the H.A. Shelton 77-A Trust and (d) as Trustee for the Katherine Shelton R. 77-A Trust, and (e) as Trustee for the RR Shelton 1973 Trust, and (f) as Trustee for the RR Shelton 77-A Trust, and (g) as Trustee for the Sarita M. Shelton 1977-A Trust

(59) Alan F. Lucke, as Independent Co-Executor of the Estate of J. Rogers Rainey, Jr., who was formerly Successor Trustee for the benefit of the Children of Robert R. Shelton and their descendants under Trust dated 7-27-67 and (a) as Successor Trustee for the benefit of the Children of Robert R. Shelton and their descendants under Trust dated 7-27-67 and (b) as Trustee for the D.N. Shelton 77-A Trust, and (c) as Trustee for the H.A. Shelton 77-A Trust and (d) as Trustee for the Katherine Shelton R. 77-A Trust, and (e) as Trustee for the RR Shelton 1973 Trust, and (f) as Trustee for the RR Shelton 77-A Trust, and (g) as Trustee for the Sarita M. Shelton 1977-A Trust

(60) Alfred A. King, Individually

(61) Corpus Christi National Bank, as (a) Trustee of Alfred Gilbert King Trust No. 3, and (b) as Trustee of Ellen Pierpont King Trust No. 3, and (c) as Trustee of

the Gordon Ashbrook King Trust No. 3 and (d) as Administrator of the Estate of Jimmie Harrison King, and (e) as Trustee for the Mary Fearey Dewar Trust No. 3, the Alec Livingston Dewar Trust No. 2, and the Porter Fearey Dewar Trust No. 2, and (f) as Trustee for the Richard Gentry Estill, Jr. Trust, and (g) as Trustee of the Gentry Estill Johnson Trust No. 2, and (h) as Trustee of the William A. Patch, Jr. Trust No. 2 and the Alexander M. Patch Trust No. 2 and the Robert D. Patch Trust No. 2, and (I) as Trustee for the William A. Patch Trusts No. 4, and (j) as Trustee for the William A. Patch Trusts No. 4, and (j) as Trustee for the William A. Patch Trusts No. 5, and (k) as Trustee Under the Richard King Patch Trust Indenture Dated January 14, 1963, and (l) as Trustee of the Ginette V. Patch Trust, and (m) as Trustee of the Ginette V. Patch Trust No. 2, and (n) as Trustee of the Joseph D. Patch, Jr. Non-Marital Trust, and (o) as Trustee of the Patricia C. Patch Trust, and (p) as Trustee of the Diane Hall Touboul Trust, and (q) as Trustee of the Armand D. Touboul Trust, and (r) as Trustee of the Debra H. Krakauer Trust

(62) Victoria Bank & Trust successor to Corpus Christi National Bank, as (a) Trustee of Alfred Gilbert King Trust No. 3, and (b) as Trustee of Ellen Pierpont King Trust No. 3, and (c) as Trustee of the Gordon Ashbrook King Trust No. 3 and (d) as Administrator of the Estate of Jimmie Harrison King, and (e) as Trustee for the Mary Fearey Dewar Trust No. 3, the Alec Livingston Dewar Trust No. 2, and the Porter Fearey Dewar Trust No. 2, and (f) as Trustee for the Richard Gentry Estill, Jr. Trust, and (g) as Trustee of the Gentry Estill Johnson Trust No. 2, and (h) as Trustee of the William A. Patch, Jr. Trust No. 2 and the Alexander M. Patch Trust No. 2 and the Robert D. Patch Trust No. 2, and (I) as Trustee for the William A. Patch Trusts No. 4, and (j) as Trustee for the William A. Patch Trusts No. 4, and (j) as Trustee

for the William A. Patch Trusts No. 5, and (k) as Trustee Under the Richard King Patch Trust Indenture Dated January 14, 1963, and (l) as Trustee of the Ginette V. Patch Trust, and (m) as Trustee of the Ginette V. Patch Trust No. 2, and (n) as Trustee of the Joseph D. Patch, Jr. Non-Marital Trust, and (o) as Trustee of the Patricia C. Patch Trust, and (p) as Trustee of the Diane Hall Touboul Trust, and (q) as Trustee of the Armand D. Touboul Trust, and (r) as Trustee of the Debra H. Krakauer Trust

(63) Victoria Bankshares, Inc. successor to Corpus Christi National Bank, as (a) Trustee of Alfred Gilbert King Trust No. 3, and (b) as Trustee of Ellen Pierpont King Trust No. 3, and (c) as Trustee of the Gordon Ashbrook King Trust No. 3 and (d) as Administrator of the Estate of Jimmie Harrison King, and (e) as Trustee for the Mary Fearey Dewar Trust No. 3, the Alec Livingston Dewar Trust No. 2, and the Porter Fearey Dewar Trust No. 2, and (f) as Trustee for the Richard Gentry Estill, Jr. Trust, and (g) as Trustee of the Gentry Estill Johnson Trust No. 2, and (h) as Trustee of the William A. Patch, Jr. Trust No. 2 and the Alexander M. Patch Trust No. 2 and the Robert D. Patch Trust No. 2, and (I) as Trustee for the William A. Patch Trusts No. 4, and (j) as Trustee for the William A. Patch Trusts No. 4, and (j) as Trustee for the William A. Patch Trusts No. 5, and (k) as Trustee Under the Richard King Patch Trust Indenture Dated January 14, 1963, and (l) as Trustee of the Ginette V. Patch Trust, and (m) as Trustee of the Ginette V. Patch Trust No. 2, and (n) as Trustee of the Joseph D. Patch, Jr. Non-Marital Trust, and (o) as Trustee of the Patricia C. Patch Trust, and (p) as Trustee of the Diane Hall Touboul Trust, and (q) as Trustee of the Armand D. Touboul Trust, and (r) as Trustee of the Debra H. Krakauer Trust

(64) NationsBank of Texas, N.A., as successor Trustee of (a) Alfred Gilbert King Trust No. 3, (b) the Gordon Ashbrook King Trust No. 3, and (c) the Ellen Pierpont King Trust No. 3,

(65) Richard King, III, Individually

(66) John T. Langdon, Individually and as (a) Successor to Ned Langdon, Independent Executor of the Estate of Cile James Langdon, and (b) Independent Executor of the Estate of Ned Langdon, Individually

(67) Edward Schroeder, as (a) the Executor of the Estate of Mary Estill Fearey, and (b) the Executor of the Estate of Porter Fearey

(68) Mary King Estill Storie, Individually (A/K/A - Mary Fearey, Individually and as Trustee of the Mary E. and Porter Fearey Family Trust)

(69) Alice King Estill Johnson, Individually and as Trustee of the Johnson Charitable Trust

(70) F. M. Johnson, Jr., as (a) Trustee of the Johnson Charitable Trust, and (b) as Trustee of the Gentry E. Johnson Trust No. 3

(71) William Ashbrook Patch, Individually, and as Executor of the Estate of William A. Patch

(72) Alexander M. Patch, Individually

(73) Robert D. Patch, Individually

(74) Richard King Patch, Jr., Individually

(75) Cheri Patch, Individually

(76) K. B. Austin, (referred to in Plaintiffs' previous petitions as Ginette M. Patch), Individually

(77) Richard S. T. March, as Trustee of the Joseph D. Patch, Jr. Non-Marital Trust

(78) Debra (Deborah) H. Krakauer, Individually

(79) Gentry Estill Johnson, Individually, and as Trustee of the Gentry Estill Johnson Insurance Trust

(80) Frederic C. Hamilton, as (a) Trustee of the Dorothy D. Alexander Trust, and (b) as Trustee under the Estate of Robert J. Kleberg, Jr., and as (c) a Trustee of the Emory G. Alexander Trust created under the Will of Robert J. Kleberg, Jr., and (d) as a Trustee of the Emory G. Alexander Trust created under the Will of Helen C. Kleberg

(81) Ogden Phipps, as (a) Trustee of the Caroline R. Alexander Trust, and (b) as Trustee of the Emory G. Alexander Trust, and (c) as Trustee under the Estate of Robert J. Kleberg, Jr., and as (d) Trustee of the Henrietta K. Alexander Trust created under the Will of Robert J. Kleberg, Jr., and (f) as a Trustee of the Dorothy D. Alexander Trust created under the Will of Robert J. Kleberg, Jr., and (g) as a Trustee of Caroline R. Alexander Trust created under the Will of Helen C. Kleberg, and (h) as a Trustee of the Henrietta K. Alexander Trust created under the Will of Helen C. Kleberg, and (I) as a Trustee of the Dorothy D. Alexander Trust created under the Will of Helen C. Kleberg

(82) Fiduciary Trust Co. of New York (Fiduciary Trust Company International) a corporation duly incorporated as such under the laws of the State of New York, doing business in the State of Texas, as (a) Trustee for the Henrietta Kleberg Armstrong Trust for Jean M. Larkin dated 12-30-60, under the Will of Peter A. Larkin, and (b) as Trustee for the Peter A. Larkin residuary Trust under the Will of Peter A. Larkin

(83) Leslie Larkin Clement, Individually and (a) as Custodian for Henrietta C. Finger, and (b) as Trustee of the Tom R. Armstrong Successor Trust created under the

Will of Henrietta Kleberg Armstrong, and (c) as Trustee of the Henrietta K. Armstrong Trust created under the Will of Henrietta K. Armstrong

(84) William C. Eiland, Individually

(85) Armstrong, Tobin as Trustee for the Tom R. Armstrong Successor Trust, who resides in Clause County, State of Texas

(86) John Armstrong, as Trustee for the Tom R. Armstrong Successor Trust (See #16)

(87) John Bennett, Jr. as Trustee for the Tom R. Armstrong Successor Trust

(88) Roger Simpson, as Trustee for the Jitkoff 1980 Childrens Trust

(89) Dudley Campbell, as Trustee for (a) the Belton K. Johnson 62 Trust, (b) BKJ 70 Trust, (c) Cecilia Johnson 62 Trust, (d) Cecilia Johnson 70 Trust, (e) Johnson Childrens 62 Trust, (f) Sarah S. Johnson 62 Trust, (g) Sarah S. Johnson 70 Trust

(90) Donal C. O'Brien, as Trustee for (a) the Belton K. Johnson 62 Trust, (b) BKJ 70 Trust, (c) Cecilia Johnson 62 Trust, (d) Cecilia Johnson 70 Trust, and (e) Johnson Childrens 62 Trust

(91) Benjamin M. K. Espy, Individually

(92) Thomas K. Espy, Individually

(93) Ben F. Vaughn, III, as (a) Trustee for the Ben M. Espy Equity Trust, and (b) as Trustee for the Tom Espy Equity Trust, and (c) as Trustee for the Thomas K. Espy Equity Trust

(94) William Clark, as (a) Trustee for the Ben M. Espy Equity Trust, and (b) as Trustee for the Tom Espy Equity Trust

(97) First City National Bank, as Trustee for the 1642 Trust

(98) Corbett D. Hall, Individually

(99) Mary Lewis Kleberg, Individually and (a) as the Executrix of the Estate of Richard Kleberg, Jr., and (b) as the Trustee of the Richard M. Kleberg, Jr. Trust created under the Will of Richard M. Kleberg, Jr.

(100) Alan T. Dickson, as (a) Trustee for the Jean M. Larkin Trust, and (b) Louise L. Larkin Trust

(101) Alice Kleberg Meyer, Individually

(102) Deborah Dembski Shelton, as Custodian for Susan A. Shelton

(103) Shelton Ranches, Inc., a corporation duly incorporated as such under the laws of the State of Texas, with a permit to do and doing business in the State of Texas, with its principal place of business in Kerville, Texas

(104) F. Peter Zoch, as Executor of the Estate of Robert R. Shelton

(105) Edward Hartline, III, as (a) Executor of the Estate of Robert R. Shelton, and (b) as Successor Trustee for the benefit of the Children of Robert R. Shelton and their descendants under Trust dated 07-27-67 and (c) as Trustee for the D. N. Shelton 77-A Trust, and (d) as Trustee for the H.A. Shelton 77-A Trust and (e) as Trustee for the Katherine Shelton R 77-A Trust, and (f) as Trustee for the RR Shelton 1973 Trust, and (g) as Trustee for the RR Shelton 77-A Trust, and (h) as Trustee for the Sarita M. Shelton 1977-A Trust, and (I) as a Trustee of the Robert R. Shelton Trusts for the benefit of the Children of Robert R. Shelton and their Descendants under Trusts dated 7-27-67, and (j) as a Trustee of the Robert R. Shelton 1973 Trusts for the ben-

efit of the Children of Robert R. Shelton and their Descendants

(106) William R. Weaver, Individually, and (a) as Trustee for Edward B. Weaver Trust, and (b) as Trustee for the K. Elizabeth Weaver Trust

(107) Thomas E. Welch, as (a) Trustee for James L. Yarborough, and (b) as Trustee for the Yarborough 67 Trust

(108) First Midland National Bank, as Trustee for James L. Yarborough

(109) Oliveanne Marie Kleberg Bailey (referred to in Plaintiffs' previous petitions as Oliveanne Marie Kleberg), Individually

(110) Christine Lee Kleberg, Individually

(111) Richard M. Kleberg, IV, Individually

(112) Kathryn Marie King, Individually

(113) Richard King, IV, Individually

(114) Jeanette Holloway, as (a) Executrix of the Estate of Richard G. Estill, Jr., and (b) as Trustee of the Mary E. and Porter Fearey Family Trust, and (c) as Co-Trustee of the Gentry Estill Johnson Insurance Trust

(115) Patricia Hall Richards, (referred to in Plaintiffs' previous petitions as Patricia Hall Trust), Individually

(116) Langdon, Ingrid, Individually

(117) M-Trust Corporation, as Trustee for the Estate of William A. Patch, Jr.

(118) Gray, T., as Trustee for (a) the Alice K. Reynolds 67 Trust, and (b) the Katherine B. Reynolds Trust, and (c) the Michael Reynolds 67 Trust, and (d) Michael Reynolds 68 Trust

(119) Humble Oil & Refining, Company, a corporation duly incorporated as such with permit to do business in Texas, which corporation is a wholly owned subsidiary of Exxon Corporation c/o John F. Tully

(120) Jean Morehead Larkin Dobson) Individually

(121) Claire Liedtke Alexander, as (a) Trustee under the Robert Kleberg, Jr. Estate, and (b) as Trustee under the Helen C. Kleberg Estate, and (c) a Trustee of the John D. Alexander, Jr. Trust created under the Will of Robert Kleberg, Jr., and (d) as a Trustee of the John D. Alexander, Jr. Trust created under the Will of Helen C. Kleberg

(122) James Harrison King, Individually

(123) Missouri Pacific Railroad Company, a foreign corporation duly incorporated under the laws of the State of Delaware, qualified to do business in the State of Texas

(124) Missouri Improvement Company, a foreign corporation duly incorporated under the laws of the State of Missouri, qualified to do business in the State of Texas

(125) Attorney General of the State of Texas, Greg Abbott

(126) Yarborough Royalties L.P, whose general partner is Yarborough Management L.L.C.

(127) The Tio and Janell Kleberg Family Partnership, Ltd.

(128) Scott Dodds, as a Trustee of the 1980 Jitkoff Children's Trust

(129) Dianne Hall Touboul

(130) Norwest Bank Texas, South Central, as (a) Trustee of the Mary Fearey Dewar Trust No. 3, and (b) as Trustee of the Leah Dewar Trust No. 2, and (c) as

Trustee of the Alec L. Dewar Trust No. 2, and (d) as Trustee of the Porter Dewar Trust No. 2, and (e) as Trustee of the Richard K. Patch Trust dated January 14, 1963, and (f) as Trustee of the K.B. Austin Revocable Trust

(131) Clement Community Partnership, a Texas general partnership

(132) Texas Commerce Bank, Individually

(133) GLC Farms, a Florida Corporation

(134) Southwest Land and Cattle Company

(135) Helen S. Duytschaever, Individually

(136) Deborah S. Veith, Individually

(137) Sarita M. Shelton, Individually

(138) Robert R. Shelton, Jr., Individually

(139) Katherine R. Shelton, Individually

(140) Susan A. Shelton, Individually

(141) John E. Kolb, Esq., as (a) Trustee for the Belton K. Johnson 62 Trust, and (b) as Trustee for the BKJ 70 Trust, and (c) as Trustee for the Cecilia Johnson 62 Trust, and (d) as Trustee for the Cecilia Johnson 70 Trust, and (e) as Trustee for the Johnson Children's 62 Trust, and (f) as Trustee for the Sarah S. Johnson 62 Trust, and (g) as Trustee of the Sarah S. Johnson 70 Trust

(142) Greer Sugden, Individually

(143) Henrietta Chamberlin Finger Armbuster, Individually

(144) Christopher Kleberg, Individually

(145) Adrian Kleberg, Individually

(146) Peter Morse, as a Trustee of the 1980 Jitkoff Children's Trust

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review a judgment of the Supreme Court of Texas, Austin, Texas.

OPINIONS BELOW

The Nueces County District Court's judgment is not publically reported, but is reprinted in the appendix at pages 64a-67a. The Court of Appeals' opinion is reported at 41 S.W.3d 693 (Tex. Civ. App.–Corpus Christi 2001), and reprinted in the appendix hereto at pages 1a-25a. The Supreme Court of Texas' opinion is reported at 118 S.W.3d 742 (Tex. 2003), and reprinted at 26a-63a.

STATEMENT OF JURISDICTION

The trial court rendered judgment on January 5 and 13, 1998. 64a-67a. The Thirteenth Court of Appeals rendered its judgment on January 11, 2001. 25a. Respondents timely filed a petition for review in the Supreme Court of Texas which was granted on January 16, 2003. 46a. The Supreme Court of Texas reversed and rendered judgment for Respondents on August 28, 2003. 36a. Petitioners timely filed a motion for rehearing, which was denied on November 21, 2003. 68a. This petition is timely filed on February 19, 2004. This Court has jurisdiction to review this final judgment of a state court. 28 U.S.C. §1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS

AMENDMENT 14 § 1. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

On August 23, 1992, a Corpus Christi newspaper published an interview of Bruce Cheeseman, Archivist and Historian for Texas icon King Ranch. 12a. Cheeseman has extensive knowledge of the Ranch's oral and written history, and its comprehensive archive which contains correspondence and other documents from the inception of the Ranch.

The documents show King Ranch was founded by Richard King around 1853. Upon King's death in 1885, a lawyer named Kleberg married King's daughter and assumed control of the Ranch. Descendants of King and Kleberg still claim the Ranch today, including the part disputed here. The Ranch is now used for oil and gas production, entertaining, and hunting.

Cheeseman was asked if Kleberg was really working for King when he confessed a consent judgment granting King the disputed property in *Chapman v. King*. In that litigation Kleberg purported to represent King's adversaries, opposing title holders Helen Chapman and when she died during the litigation, her heirs. Five of Helen's heirs were minors owning vested remainders, two lived in South Carolina. During the Chapman litigation King hired Kleberg to defend him in a case where King

engaged in a similar no-notice fraud on the estate of a decedent.

Cheeseman said: "Clearly, Kleberg was looking after the interests of his in-state client verses the interests of his out of state client." 12a-13a. In his deposition Cheeseman falsely denied making this statement. *See* 13a.

King was the "in-state client." Through various wills, Respondents claim they are donee successors of all property rights of King and Kleberg. No Respondents claims rights of a bona-fide purchaser.

Helen Chapman was the "out of state client." Through various wills, Petitioners hold the property rights of Helen's five grandchildren, which are now fee simple absolute interests.

Soon after Cheeseman's admission, Petitioners hired counsel and filed the instant bill of review to set aside this fraudulent judgment. The record in *Chapman v. King* shows King and Kleberg did not serve the five minor remaindermen, but nevertheless agreed to a judgment purporting to bind their property rights. Since this is a fraud case, the sequence of events is critical. This is what the summary judgment evidence shows.

Helen Chapman owned a ½ undivided fee simple absolute property interest in the Rincon de Santa Gertrudis. It is a 15,500 acre tract of land in what was then Nueces County and is now Kleberg County, Texas. She acquired this property from her husband, who in turn acquired it through a deed from King and a deed from Lewis granting him a 1/4 interest each. 2a-3a. King owned the other ½. Helen and King were cotentants. Like most states, in Texas a fee property interest is perpetual, and the greatest estate possible.

During the Civil War Helen lived in the North with her daughter. Helen returned to South Texas after the war and was forced to sue King to protect her property rights.

Helen hired a lawfirm Lackey & Stayton, and filed suit on April 11, 1879. It was Cause No. 1279, Helen Chapman v. Richard King, in the 25th District Court, Nueces County, Texas. King pleaded limitations. His defenses were meritless. Statutes of limitations were suspended during and after the civil war, specifically, from January 28, 1861, until March 30, 1870. No claim of adverse possession could have run prior to the filing of Helen's suit. *Collier v. Couts*, 92 Tex. 234, 40 S.W. 525 (Tex. 1898). Helen's lawsuit interrupted King's claim for adverse possession. *See now* TEX. CIV. PRAC. & REMS CODE ANN. §16.021(3) (Vernon 1985).

King asked his lawyers for advice, and the archives contain a letter from a lawyer named Stepehen Powers, of Powers and Wells. On November 3, 1880, he wrote and advised King that Helen's claim was valid and to settle if he could. 21a.

In 1881, Kleberg joined Lackey & Stayton as a partner, and it became Lackey, Stayton, & Kleberg. 14a. He handled business in the Nueces County office.

The archives contain a letter from Kleberg to his parents dated July 24, 1881. It shows King invited Kleberg to the Ranch and asked Kleberg to "attend to his legal business for him." 14a. The official King Ranch history book published in 1957 claims this is when King started paying Kleberg a retainer of $5000 per year. 13a-14a. Regardless of how much King was paying Kleberg, by March 17, 1882, Kleberg was defending King in *Sobrinos v. Chamberlain*, 13 S.W. 634 (Tex. 1890). 43a. That

case is just like this one because King was sued for fraud on a decedent's estate.

Right after Kleberg returned from the ranch he first appeared in Helen's case in August of 1881. He immediately stipulated with King's attorney, McManus, that deeds of record were admissible, *i.e.* the King deed. Nothing was agreed about the Lewis deed.

On December 10, 1881, Helen died in South Carolina. 40a. She had no debts. At death, her property rights passed *eo instante* to her children and grandchildren pursuant to her will. She granted several bequests and divided the residue of her property into two equal parts. 3a. In one part she granted a life estate to her son Willie Chapman who lived in Corpus Christi and a vested remainder in trust to his three children William W. Chapman (age 1), Helen Preston Chapman (age 8), Jesse Chapman (age 14). In the other part she granted a life estate to her daughter Helen Chapman Brayton who lived in South Carolina with a vested remainder in trust to Marion Brayton (age 4) and Helen C. Brayton (age 2). Helen's will appointed Rankin and Brayton co-executors. Brayton qualified as executor in South Carolina. Rankin was appointed by the Nueces County Probate Court as executor with will annexed.

Before taking any further action in Cause No. 1279 the Texas court was required by law to issue and serve *scire facias* to acquire personal jurisdiction over Helen's seven heirs, including her five minor grandchildren. *Gracey v. West*, 422 S.W.2d 913, 918-19 (Tex. 1968). Since Helen's five grandchildren owned her property rights, they were necessary parties. *East v. Dugan*, 79 Tex. 329, 15 S.W. 273 (1891). An executor cannot bind heirs' property rights because he does not own them or represent the heirs. *Id.* Minor heirs are entitled to a guardian *ad litem*. *Yarborough v. Yarborough*, 290 U.S.

202, 210 (1933); *Wright v. Jones*, 52 S.W.2d 247 (Tex. Comm'n App. 1932).

King and Kleberg did not join any of Helen's heirs. 40a. No guardian *ad litem* was appointed. Cause No. 1279 remained pending through 1881 and 1882.

On April 7, 1883, Kleberg intervened Rankin and confessed a consent judgment purporting to award King all property rights owned by Helen's five grandchildren. 40a-41a. On April 23, 1883, Kleberg wrote Brayton in South Carolina, stating he could only prove title to 1/4 of disputed tract. 41a. According to deed records this statement was true. But this statement was false. 18a-21a. It could only be proven false by a careful examination of court records and extrinsic evidence.

King died two years later. Kleberg probated King's will and took possession. He became manager of the Ranch and married King's daughter.

Soon after the first life tenant died in 1902, Kleberg formed the Kleberg Town and Improvement Company. King's wife conveyed part of the Rincon to this company. This is when Kleberg's nephew filed the Lewis deed of record, twenty-one years after the 1883 judgment and forty years after this deed was signed. 19a. After King's wife died her heirs formed Respondent King Ranch, Inc. It claims most of the disputed land.

Kleberg's company hired Powers' law partner, Jim Wells, to render a title opinion. This opinion misrepresents the property rights of Kleberg's former client, Helen, and the property rights of Helen's grandchildren. Wells stated Kleberg's company held title to the Rincon. Kleberg began selling lots to people who settled what is now known as Kingsville. The Kingsville Naval Air Station, which is owned by the Government, sits on another part of the Rincon. Respondents claim the rest.

Soon after Cheeseman admitted Kleberg was really looking out for King, Petitioners filed suit against Respondents to set aside the judgment in Cause No. 1279.

Petitioners did not sue residents of Kingsville or the Government. Petitioners did sue only those who claimed they inherited rights from King and Kleberg. These Respondents paid nothing, and cannot be bona-fide purchasers. Humble Oil Company leased the minerals. Petitioners sued Humble's successor, Exxon, and ratified the mineral lease. Exxon did not prove it was a bona-fide purchaser in its summary judgment motion, and probably cannot.

Petitioners filed a bill of review, a declaratory judgment seeking a declaration that they were not bound by the 1883 judgment, a trespass to try title, and a suit to remove a cloud on their title. Respondents moved for summary judgment arguing Petitioners were bound by the 1883 judgment because there was "no evidence" of extrinsic fraud and Petitioners' predecessors were negligent. Respondents did not claim Petitioners lacked a meritorious defense. *Compare Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988) (reversing Texas courts for requiring a bill of review petitioner seeking to overturn a no-notice judgment to prove a meritorious defense). Respondents asserted adverse possession against the trespass to try title claim.

The state trial court granted Respondents' summary judgment motion and denied Petitioners' motion for partial summary judgment. The Court of Appeals found sufficient evidence of fraud to remand for a jury trial. 25a. Respondents secured discretionary review in the Supreme Court of Texas. That Court held that, as a matter of law, Petitioners were bound by the 1883 judgment because there was "no evidence" of "extrinsic fraud."

58a. It also held, as a matter of law, the no-notice judgment triggered adverse possession against Helen's minor remaindermen. 61a. This petition follows.

Reasons for granting the *writ*

This Court must grant the writ to decide if Texas bill of review procedure is inadequate to determine if relief must be granted from judgments violating the due process clause for, among other things, lack of notice?

This Court should first decide if a person seeking relief from a no-service judgment must also prove two elements in the Texas bill of review procedure: extrinsic fraud and no negligence. This Court already decided a person need not prove a meritorious defense. *Peralta,* 485 U.S. at 86. It was conceded below that Petitioners have a meritorious defense to at least 1/4 of the disputed property based on the unrecorded Lewis Deed.

The Supreme Court of Texas held even in a no-service judgment the bill of review Petitioner must prove extrinsic fraud. 58a. This question is important because Texas and other state courts issue final judgments deciding property rights expressly protected by the due process clause. Many states employ a bill of review or a similar procedure. If this holding is correct, this Court's most important due process jurisprudence is in jeopardy.

From the earliest days due process required notice.

Notice is the essential or core requirement of due process. From the beginning, this Court required notice before binding persons to a judgment. Failure to give notice violates 'the most rudimentary demands of due process of law.' " *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878). In *Fuentes v. Shevin*, 407 U.S. 67 (1972), this

Court wrote "[f]or more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' *Baldwin v. Hale*, 1 Wall. 223, 233 1863." *Fuentes*, 407 U.S. at 69.

In *Chase Nat. Bank v. Norwalk*, 291 U.S. 431, 440-41 (1934), this Court recognized a person who is not served has no duty to appear or answer. Even an unserved person with actual knowledge of a suit "may rest assured that a judgment recovered therein will not affect his legal rights." *Id.* at 441.

It is undisputed that Helen's grandchildren received no notice of Cause No. 1279, including service of citation, notice of any hearing, notice of the judgment, or any other notice. 23a; 40a. Since Helen's grandchildren were minors, and no guardian ad litem was appointed, they were incapable of being noticed. As shown below, Texas bill of review procedure is not designed to, and does not, test a judgment for failure to comply with notice requirements of due process.

Texas bill of review procedure does not even consider if a Petitioner received notice.

In Texas a judgment is unappealable after 30 days. Like many States, to decide whether to grant relief from an unappealable judgment Texas applies a common law procedure called a "bill of review." *Peralta;* 49a-51a. Before FED. R. CIV. P. 60(b), federal courts applied a similar analysis. *Marshall v. Holmes*, 141 U.S. 238 (1891). A bill of review is a court controlled, common law procedure. Separation of powers prevents a legislature from interfering with a court's power over its judgments. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995).

Texas courts require proof of three elements, which are the petitioner 1) was prevented from proving his case by the fraud, accident, or wrongful act of the opposing party (*i.e.* extrinsic fraud), 2) was not negligent, and 3) has a meritorious defense. 50a. Texas has elaborate and conflicting standards for what constitutes extrinsic fraud, and these standards conflict with those in other states. For example, in Texas fraud by a party's lawyer is not enough. 51a. In other States, fraud by a lawyer is grounds to set aside a judgment.

Texas requires proof of extrinsic fraud to set aside a no-notice judgment.

Following this three-part formula, the Supreme Court of Texas decided Petitioners have no remedy unless they present evidence on extrinsic fraud. 50a. It held there was "no evidence" of extrinsic fraud. 58a. The Supreme Court of Texas decided evidence of Kleberg's fraud was not enough and required proof of King's fraud. 51a; 58a.

In deciding whether King committed fraud, the Supreme Court of Texas did not provide any weight at all to the undisputed facts that the minors whose property rights were negated in the judgment were not served with citation, represented by a guardian *ad litem*, or given any notice whatsoever that a Texas court was taking away their property rights. 51a-58a. The Court of Appeals agreed with Petitioners that proof of no service is evidence of fraud. 11a-12a. The Court of Appeals did not reach the constitutional issue, which is whether proof of no service obviates the requirement to prove extrinsic fraud.

The Supreme Court of Texas also decided the fact that King began employing Kleberg as his attorney before the judgment in Cause No. 1279 was "no evidence" of King's fraud. 52a. The Court ignored the fact that while

Kleberg was King's lawyer Kleberg confessed a judgment for King, and against Helen's unserved minor heirs who received nothing in the judgment. According to Texas law, real property inherited by a minor could not be sold except to pay debts of the decedent. *Baker v. Coe*, 20 Tex. 429 (Tex. 1857). Moreover, Kleberg took possession after King's death in 1885. 43a. This means Kleberg was, according to the holding of the Supreme Court of Texas, adversely possessing for King's heirs and against Helen's minor remaindermen just when those interests became possessory fee interests. *See* 62a.

The Supreme Court of Texas did not decide the case on the basis that a statute of limitations might bar the bill of review, and the Court of Appeals correctly held it was no defense. 21a-22a. A State law limitations defense to an action to set aside a no-service judgment would conflict with this Court's powerful line of authority holding States cannot alter a person's legal rights by a judgment unless and until they are lawfully served. *Chase Nat. Bank,* 291 U.S. at 440-41.

This Court already reversed Texas courts for requiring proof of a meritorious defense to set aside a no-service judgment.

In *Peralta,* the Texas Court assumed the first two requirements of a bill of review could be proven. That Texas trial court denied relief because the Petitioner could not show the third element, which is a meritorious defense. The Court of Appeals affirmed and the Supreme Court of Texas denied review.

This Court reversed. *Peralta*, 485 U.S. at 85. It held a party seeking to set aside a no service judgment need not prove a meritorious defense. States are required to "wipe the slate clean" and place such a Petitioner in the same

position as if due process been afforded in the first place. *Id.* at 86.

It is undisputed Helen's grandchildren were not served in Cause No. 1279. 40a. They owned property in the form of vested remainder interests. They were minors. One was just one year old. Two lived in South Carolina. No guardians *ad litem* were appointed. The question squarely presented is if a Petitioner showing no service must also prove extrinsic fraud and the absence of negligence.

Since Petitioners proved no service, the Texas court erred by requiring proof of extrinsic fraud and the absence of negligence.

Even before *Pennoyer v. Neff*, it was extremely clear lawful service is a constitutional minimum. This Court has long held if a person did not receive constitutionally required notice, they are not bound by a resulting judgment. This rule should apply if the person was not lawfully served because of an opponents' extrinsic fraud or another reason. Either way, the judgment is constitutionally infirm. Stated alternatively, King's failure to serve the minor property owners in this case is, as a matter of law, the constitutional equivalent of extrinsic fraud. States cannot require proof of additional facts before granting the bill of review and setting aside a no-service judgment. *See Peralta*, 480 U.S. 85.

Similarly, it does not matter in a constitutional sense whether the unserved petitioner purportedly bound by a judgment was or was not "negligent." *Chase Nat. Bank v. Norwalk*, 291 U.S. 431, 440-41 (1934). Unless and until constitutionally required notice occurs, a person has no duty to answer or defend. *Id.* An unserved person with actual knowledge of a suit "may rest assured that a judgment recovered therein will not affect his legal

rights." *Id.* at 441. In other words, proof of no service conclusively establishes the person was not negligent, there being no breach of a duty to answer. *Id.* This rule should apply with greater force where, as here, the persons purportedly bound include a two-year-old living in another State.

Because Petitioners proved no service, the Supreme Court of Texas seriously erred by requiring proof of extrinsic fraud. A very similar error was unacceptable to this Court in *Peralta*. The same should be true here.

This Court must grant the *writ* to consider how much fraud is enough to invalidate a state court judgment on due process grounds.

This Court should alternatively decide if the due process clause requires state courts to relieve a party from a judgment procured by fraud. This Court recognizes "sufficiently gross" fraud is a reason for a federal court to set aside a judgment, including a state court judgment. *Marshall v. Holmes*, 141 U.S. 238 (1891). But it has never decided a State court is required to grant relief.

The most likely opportunity for this Court to act is if a State Court erroneously denies relief from a fraudulent judgment. This is such a case.

This Court holds gross fraud relieves a party from a judgment.

In *United States v. Throckmorton*, 98 U.S. 61 (1878), this Court recognized the traditional power of a court to relieve a party from a fraudulent judgment:

> Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compro-

> mise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side.—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing.

Id., 98 U.S. at 61. Thereafter, this Court held federal courts have power to set aside a State court judgment based on a forged document. *Marshall*, 141 U.S. at 596. This Court recently recognized *Marshall* as an example of the degree or character of fraud sufficiently gross to require relief from a judgment. *United States v. Beggerly*, 524 U.S. 38 (1998). In *Beggerly* this Court decided mere failure to disclose by an opposing party was not sufficient. *Id.* at 47.

In *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, (1944), the leading case, this Court expressly recognized the power of a federal court to devitalize a fraudulent judgment. That fraud occurred in a patent dispute. After losing at trial, opposing lawyers cited to the court of appeals a purportedly neutral article regarding the patent at issue. Those same lawyers secretly wrote the article and paid a prominent expert to sign it. The article falsely claimed the disputed process was "a remarkable advance in the art of fashioning glass by machine." *Id.*

This scheme was completely successful, and the article was relied on by the court of appeals in reversing the trial court. The judgment was set aside 12 years after it

was rendered, the only question being whether the rights of a bona-fide purchaser intervened. This Court wrote:

> A judgment finally entered has never been regarded as completely immune from impeachment after the term. From the beginning there has existed along side the term rule a rule of equity to the effect that under certain circumstances, one of which is after discovered fraud, relief will be granted against judgments regardless of the term of their entry.

Hazel-Atlas, 342 U.S. 251.

Other states follow *Hazel-Atlas*. For example in *Chewning v. Ford*, 579 S.E.2d 605 (S.C. 2003), the Supreme Court of South Carolina decided that if a party proves a judgment was procured by fraud on the court a trial court has inherent equitable power to set aside such a judgment at any time, even if a statute of limitations purports to apply. The type of fraud that qualifies is perpetrated by an officer of the court, like an attorney. *See Id. Chewning,* 579 S.E.2d at 611 (citing cases); *see also Sutter v. Easterly, Executor*, 189 S.W.2d 284 (Mo. 1945).

In *Sedlak v. Duda*, 13 N.W.2d 892 (Neb 1944), the Nebraska Court held that an undisclosed dual representation was *per se* fraudulent and set aside the resulting judgment. In this case Helen's grandchildren were not old enough to understand or consent to Kleberg's dual representation. The Nebraska and Texas holdings directly conflict. Remarkably, the Texas Court went further and decided no evidence showed Kleberg had a conflict of interest. 52a. *But see* Restatement (Third) Law Governing Lawyers §128.

From the beginning, this Court and other State Courts recognize the historic equitable power of a court to set aside a judgment for fraud. The fraud shown here is substantially more unfair than non-service, as in *Peralta*.

The reason Helen's grandchildren were not served is due to the fraud of their lawyer and the opposing party, and their fraud effectively prevented Petitioners from knowing of their property rights until Cheeseman's disclosure. This Court must reverse the Supreme Court of Texas for failing to grant a remedy from this no-service judgment, and this Court must also recognize what is already obvious, the due process clause bars state courts from rendering or enforcing fraudulent judgments.

This Court must hold the fraud shown here requires relief from this judgment.

Two reasons require this Court to acknowledge due process prohibits state courts from rendering or enforcing a fraudulent judgment. First, the due process clause of the Fourteenth Amendment specifically requires "due process" before a State court may deprive a person of life, liberty, or property. For example, a party is entitled to a judicial officer with no interest in the outcome. *Hansberry v. Lee*, 311 U.S. 32, 45 (1940); *Tumey v. Ohio*, 273 U.S. 510 (1927). The fraud shown here negates the idea that Helen's grandchildren received due process.

Second, all state and federal courts are required to grant full faith and credit to state court judgments. Long established constitutional limits to issue and claim preclusion hold a state court judgment must meet certain minimum fairness criteria to qualify. These have in various ways been defined by this Court. *See e.g. Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313, 329 (1971) (persons who never had an opportunity to litigate cannot be bound by a judgment); *Hanson v. Denckla*, 357 U.S. 235, 249 (1958); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Hansberry v. Lee*, 311 U.S. 32 (1940) (represented persons are

not bound if representatives are inadequate). But this Court has never squarely decided how much fraud is enough to invalidate a state court judgment. It should do so here.

The evidence of fraud is sufficient to require at least a jury trial.

More than a scintilla of evidence shows a reason why this no-service judgment occurred was due to collusion and fraud between King and Kleberg. From a due process perspective, corruption of one party's lawyer by an opponent is more gross than using a forged document to secure a judgment, and, as discussed below, more gross than bribing a trial judge. The reason why is the type of fraud shown here covertly negates the adversary process and therefore the truth seeking function of a judicial proceeding.

In the forged document scenario, the wronged party is able to file an answer, hire documents experts, litigate the issue, present the truth to the court, and appeal within 30 days. The instant case is far worse because collusion between King and Kleberg prevented the minors from presenting their rights to the trial court or knowing of them after trial. Since the trial court could not have lawfully rendered judgment had it known of the minors' property rights, it is apparent King and Kleberg also committed fraud on the trial court.

Even bribing a trial judge causes less harm than the fraud shown here. As in the forgery case, if the trial court accepts a bribe and rules against a party, that party can appeal. In this case the minors' rights were negated without the chance for an appeal.

The evidence shows the character and degree of fraud requiring a remedy. The Supreme Court of Texas rec-

ognized Helen's grandchildren were not served. 40a. But it did not consider that fact as any evidence of fraud on them. As discussed above, even before *Pennoyer v. Neff*, Federal law required service on them. Texas statutory and decisional law required service on them. State and federal law also required appointment of guardians *ad litem*. The evidence is undisputed that King and Kleberg agreed to a judgment negating property rights of unserved minors. This is sufficient evidence to merit a jury trial on the issue whether they jointly committed fraud on the unserved minors.

The Court also refused to consider as evidence of fraud that, according to the Court, the judgment conclusively constituted notice of repudiation of the minor's title, thereby triggering adverse possession. 60a-61a. The Texas legislature defined adverse possession as an "appropriation of another's real property." The Texas Penal Code defined theft as "appropriation" of property without "effective consent." The two concepts are synonymous. According to the Supreme Court of Texas, it is no evidence of a fraudulent conspiracy for King and Kleberg to agree to a judgment triggering theft of an unserved minor's property. This is precisely the type of "serious consequence" on an unserved person the due process clause prohibits. *Peralta*, 80 U.S. 85. It is fraud *per se*.

But the Court's failure to hold adverse possession is evidence of fraud pales in comparison to the evidence showing just who was adversely possessing this property. The evidence shows it was Kleberg who was adversely possessing for King's successors and against his own clients. Helen conveyed these property rights in trust, in vested remainder to her minor grandchildren. Thus, according to the Supreme Court of Texas, if a lawyer adversely possesses his dead client's trust prop-

erty, and does not disclose this fact to the client's heirs, who he also purports to represent, it is no evidence of fraud. Petitioners cannot even set aside the judgment as to Kleberg's successors.

The adverse possession holding violates the due process clause in another way. Under Texas common law a co-tenant, beneficiary of a trust, or other joint tenant is entitled to specific notice of repudiation, *i.e.* that the other is claiming and possessing adversely their property. 59a. Adverse possession statutes cannot accrue or start running until such notice is received by the true owner of the real property.

The problem here is the Supreme Court of Texas is holding a no-service judgment is conclusive notice of adverse possession to a person who is one year old, not served, not represented, and the victim of a fraudulent conspiracy. This is precisely the type of "substantial adverse consequence" of a no notice judgment which due process does not permit. *Peralta*, 480 U.S. 86, 87. If this holding is allowed to stand, Texas and other States will be able to validate the worst sort of no-service judgments through adverse possession, limitations defenses, or even the 30 day limit Texas applies. Moreover, if Texas or any other State has a scheme of property law that determines real property rights based on notice, that State cannot, consistent with the Fourteenth Amendment, charge a person who is one year old with such notice.

What remedies are required?

For a no-service judgment, this Court identified the core equitable remedy in *Peralta*. The Court must "wipe the slate clean." 485 U.S. 87. This is the minimum required remedy. It means vacating the 1883 judgment and ordering a new trial. This remedy is necessary to vindicate the well established due process principle that

until a person is served, they have no duty to answer and defend. *Chase Nat. Bank*, 291 U.S. at 440-41. If a state statute of limitations was permitted to validate a no-service judgment, it would nullify this principle.

In a case where a third party held rights of a bona-fide purchaser, equity might allow a different rule. But under the unique facts of this case the fruits of the fraud are before this Court.

If this Court decides evidence of fraud is sufficient to go to the jury the Court should remand, but for different reasons. A fraudulently procured judgment is "a wrong against the institutions set up to protect and safeguard the public . . ." *Hazel-Atlas*, 342 U.S. at 251. "[A] decision produced by fraud on the court is not in essence a decision at all and never becomes final." 11 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE § 2870 at 409 (1995). Limitations is no defense. *Hazel-Atlas*, 342 U.S. 251; *Chewning*, 579 S.C. at 608; *see* 21a-22a. Courts need not "wait upon the diligence of the litigants." *Id.* Limitations cannot bar a Court from granting equitable relief or cleansing itself after being defiled by fraud.

For example, in *New York Life Ins. Co. v. Nashville Trust Co.*, 292 S.W.2d 749 (Tn. 1956), an insurance company paid a judgment enforcing a life insurance policy. Twenty years later the insurance company sought to set aside the judgment. It offered evidence showing the claim was exaggerated when the alleged decedent was found alive raising another family. The Court traced the proceeds to a trust account, and set aside the judgment.

Any other rule would simply encourage clever frauds.

This Court should remand or render judgment for Petitioners.

This Court has already determined State courts reviewing a no-service judgment must, at a minimum, "wipe the slate clean" and restore the parties to their positions before the judgment was rendered. *Peralta*, 480 U.S. 86. In this factually unique case no Respondent holds the rights of a bona-fide purchaser. Thus, no equitable reason exists to depart from this rule.

However, King was a party to the judgment. In the judgment he admitted Petitioners owned 1/4 of the disputed tract. Petitioners moved for partial summary judgment. This motion conclusively proved Helen's grandchildren held a ½ undivided vested remainder interest in trust, they were not served, and that Petitioners inherited these property rights. This Court should accordingly render judgment for Petitioners for an undivided 1/4 of the disputed tract. Alternatively, this Court should render judgment upholding Petitioners' property rights to their ½ undivided interest identified in the 1883 judgment. Regardless of this Court's ruling it should also remand for Petitioners to prove up past-due royalties, rental value, and damages.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI

No. 13-98-163-CV

WILLIAM WARREN CHAPMAN, III, ET AL.,

Appellants,

—v.—

KING RANCH, INC., ET AL.,

Appellees.

On appeal from the 28th District Court
of Nueces County, Texas.

OPINION

Before Justices Dorsey, Hinojosa, and Chavez[1]

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[1] Retired Justice Melchor Chavez, assigned to this Court by the Chief Justice of the Supreme Court of Texas pursuant to Tex. Gov't Code Ann. § 49.09(f) (Vernon 1998).

Opinion by Justice Hinojosa

Appellants, the heirs and devisees of William and Helen Chapman, brought a trespass to try title suit against appellees to establish their title to an undivided one-half interest in approximately 15,449.4 acres of land known as the "Rincon de Santa Gertrudis" ("the Rincon"). Appellants also sought a bill of review to set aside a consent judgment entered in 1883 which conveyed the Chapman family's interest in the Rincon to Richard King. The trial court granted appellees' motions for summary judgment. By five issues, appellants contend the trial court erred in granting appellees' motions for summary judgment. We reverse and remand.

A. Historical Background

The Rincon is located south of Corpus Christi, Texas and today covers parts of the King Ranch, the City of Kingsville, and the Kingsville Naval Air Station. About 150 years ago, the State of Texas issued a land patent conveying the Rincon to the heirs of Juan Mendiola. On July 23, 1853, they sold the Rincon to Richard King who on November 11, 1853 sold an undivided one-half interest in the Rincon to Gideon Lewis. On April 25, 1856, King executed a deed to William Chapman, conveying to him an undivided one-half interest in the remaining undivided one-half interest which King owned in the Rincon for the sum of one hundred dollars. Thus, King and Chapman each owned an undivided one-fourth interest in the Rincon.

Lewis died in 1855, and the administrator of his estate, Hamilton Bee, sold the estate's undivided one-half interest in the Rincon to King and Chapman. In 1856, Bee executed a deed ("the Lewis Deed") convey-

ing the property to King and Chapman, jointly, for the sum of $1575 for which King gave his individual promissory note. Upon the execution of the Lewis Deed, King and Chapman each owned an undivided one-half interest in the Rincon. According to appellants, the Lewis Deed was *not* delivered to Chapman, but was delivered to King, or to King's agents and attorneys. The Lewis Deed was not recorded until 1904, forty-eight years after it was executed.

Chapman died testate in 1859 and left all of his property to his wife, Helen Chapman. Upon probate of his will, Helen became the owner of an undivided one-half interest in the Rincon. On April 11, 1879, she brought a trespass to try title suit against King in the 25th District Court of Nueces County, Texas ("the 1879 Suit").[2] In this suit, Helen sought to affirm her title and obtain possession of the undivided one-half interest in the Rincon which she had received from her husband. She based her claim on the one-fourth interest deeded by King to Chapman and the one-half interest jointly purchased by King and Chapman from the Lewis Estate.

B. Helen Chapman's Will

Helen had two children and five grandchildren. In 1881, she died while a resident of South Carolina. Her will directed that "the entire rest and residue" of her property be divided into two equal parts. She granted a life estate in one part to her son with the vested remainder to his three children. She granted a life estate in the remaining part to her daughter with the vested remainder to her daughter's two children. Her will appointed Ellery

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[2] This suit was designated as Cause No. 1279. The pleadings on file in Cause No. 1279 state that Helen B. Chapman was first ejected by Richard King about two years prior to the filing of the suit.

Brayton and John Rankin as co-executors. Brayton probated her will in South Carolina, and afterwards, Rankin probated the will in Nueces County, Texas. After Rankin probated Helen's will, he was substituted as the plaintiff in the 1879 Suit. Attorney Robert J. Kleberg represented Rankin in the 1879 Suit. During the pendency of the 1879 Suit, Richard King hired Kleberg as his attorney.

C. The 1883 Judgment

The 1879 Suit was settled by a consent judgment signed by the trial court on April 7, 1883 ("the 1883 Judgment"). The judgment stated, in part:

> Plaintiff herein is entitled to recover one-half of the land sued for by the plaintiff . . . but in consideration of the moneyed judgment hereinafter set out and rendered in favor of the Plaintiff and against the Defendant Richard King, it is now here, by consent of the parties herein, ordered adjudged and decreed by the court, that all the right title and interest of said estate of Helen B. Chapman, deceased, in and to the said grant originally made to Juan Mendiola be vested in Richard King the defendant herein, and that he be quieted in his possession of the said tract of land described in plaintiff's petition. . . . And it is now here further ordered adjudged and decreed that the Plaintiff do now have and recover of and from the Defendant Richard King the sum of . . . $5811.75 . . . .

Critical to this case is the recitation that "Plaintiff herein is entitled to recover one-half of the land sued for." The judgment set forth that Helen could only recover a one-fourth interest in the Rincon, that is, one-

half of the one-half interest which she had sought to recover from King.

After entry of the judgment, Kleberg wrote a letter dated April 21, 1883, advising Ellery Brayton (the co-executor of Helen's will) that "The claim was for 7,749 acres, but we could only show or prove title in one-half, that is, 3,874½ acres, ..." Appellants assert that the "one-half" which Kleberg claimed he could not prove involved the undivided one-half interest in the Rincon conveyed to King and Chapman in the unrecorded Lewis Deed.

D. The Present Suit

On April 20, 1995, appellants sued King Ranch, Inc., King Ranch Oil & Gas, Inc., and numerous other defendants,[3] asserting they are the record owners of an undivided one-half interest in the Rincon. They alleged that the 1883 Judgment was the result of a "conspiracy" between Richard King, Robert J. Kleberg, and others to deprive Helen Chapman's children and grandchildren of their respective life estates and estates in remainder in the Rincon by using, selling, leasing for oil and gas, and otherwise disposing of, the undivided interests of these co-tenants, and concealing this fraud, both actual and constructive. Appellants alleged, in part, that: (1) King and Kleberg entered the 1883 Judgment knowing that John Rankin had no authority from the probate court to settle the suit; (2) the conspirators concealed from the trial court that Helen's grandchildren were minors, that

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[3] All of the defendants are persons or entities who have owned or claimed to own, or now own or claim to own, any lands or interests in lands which are or were a part of the original Juan Mendiola Survey as described by the patent issued to his heirs by the State of Texas.

they were indispensable parties to the 1879 Suit, and that the interests of these children as remaindermen were without the protection of a guardian ad litem; (3) Kleberg misrepresented to Helen's co-executor, Ellery Brayton, that he could only prove title to one-half of the property that Helen sought to recover in the 1879 Suit;[4] and (4) when Kleberg was acting for the Chapman Estate he was actually in the employ of Richard King as an attorney, and no disclosure of this relationship was made to the Chapman family.

Based on these allegations appellants sought a bill of review as a direct attack to set aside the 1883 Judgment. In the alternative, they asserted a trespass to try title claim, seeking to recover their title and possession to an undivided one-half interest in the Rincon. In the alternative to that claim, they asserted an action to quiet title.

E. Standard of Review

A "no-evidence" summary judgment granted under Texas Rule of Civil Procedure 166a(i) is essentially a pre-trial directed verdict, and we apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed ver-

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[4] Appellants claimed that this representation was false because: (1) title to one-half of what Helen claimed in the 1879 Suit was established by the deed from Richard King to William Warren Chapman which conveyed an undivided one-fourth interest in the Rincon to Chapman; this deed was recorded; (2) King's pleadings in the 1879 Suit showed that the deed to the other one-half of what Helen claimed—the deed from the Lewis Estate jointly to King and Chapman (Lewis Deed)—existed and that the conveyance had occurred; (3) even though the Lewis Deed was at all times in King's possession it was not filed for record until 1904, some forty-eight years after it was executed and some twenty-one years after the 1883 Judgment.

dict. *Zapata v. Children's Clinic*, 997 S.W.2d 745, 747 (Tex. App.–Corpus Christi 1999, pet. denied); *Moore v. K Mart Corp.*, 981 S.W.2d 266, 269 (Tex. App.–San Antonio 1998, pet. denied); *Moritz v. Bueche*, 980 S.W.2d 849, 853 (Tex. App.–San Antonio 1998, no pet.). We review the evidence in the light most favorable to the party against whom the summary judgment was rendered, disregarding all contrary evidence and inferences. *Merrill Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997); *Zapata*, 997 S.W.2d at 747; *Connell v. Connell*, 889 S.W.2d 534, 537 (Tex. App.–San Antonio 1994, writ denied). A no-evidence summary judgment is improper if the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact. *Havner*, 953 S.W.2d at 711; *Zapata*, 997 S.W.2d at 747. Less than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise or suspicion of a fact. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983); *Zapata*, 997 S.W.2d at 747. More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Havner*, 953 S.W.2d at 711; *Zapata*, 997 S.W.2d at 747.

If a summary judgment is granted generally, without specifying the reason, it will be upheld if any ground in the motion for summary judgment can be sustained. *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989); *Weakly v. East*, 900 S.W.2d 755, 758 (Tex. App.–Corpus Christi 1995, writ denied); *Benavides v. Moore*, 848 S.W.2d 190, 192 (Tex. App.–Corpus Christi 1992, writ denied).

F. The Reynolds' Motion for Summary Judgment

By their first issue, appellants question whether a summary judgment motion which does not set forth any specific grounds for summary judgment, but instead adopts and incorporates the summary judgment grounds alleged by a co-defendant, satisfies the requirement of Rule 166a. Appellees Michael and Katherine Reynolds filed a motion for summary judgment which did not state any specific grounds. Instead they adopted and incorporated by reference as their motion the entire summary judgment motion filed by defendant King Ranch. Appellants contend that Rule 166a does not allow a movant to adopt and incorporate, as its grounds for summary judgment, the grounds for summary judgment alleged by a co-defendant.

On January 5, 1998, the trial court granted summary judgment for King Ranch and five of the six other defendants who filed summary judgment motions. On January 13, 1998, the trial court granted summary judgment for Reynolds. Appellants contend that because the January 13th judgment is the final judgment and that because the trial court should not have granted judgment for Reynolds we must remand the case. We disagree.

The first sentence in Rule 166a(c) provides: "The motion for summary judgment shall state the specific grounds therefor." Tex. R. Civ. P. 166a(c). This rule does not say that a defendant cannot adopt and incorporate by reference as its grounds for summary judgment the summary judgment grounds alleged by a co-defendant. The case now before us is massive and complex. The clerk's record consists of more than 4,000 pages of pleadings and summary judgment evidence. The King Ranch's motion for summary judgment consists of about 1,000 pages, approximately one-fourth of the clerk's record.

There are approximately 200 defendants represented by five groups of attorneys. All of these defendants, including the appellees, have a community of interest and identical defenses to appellants' claims. All of the defendants, except Exxon Corporation, hold title under their co-defendant, King Ranch. These appellees, having the identical interest and defenses of King Ranch, adopted its summary judgment motion in its entirety and incorporated the entire motion, including King Ranch's summary judgment evidence. Had these appellees filed summary judgment motions identical to that of the King Ranch, the appellants would not have been apprised of any new evidence or defenses. But, the clerk's record would have been thousands of pages longer than it is now.

Further, rule 58 of the Texas Rules of Civil Procedure provides, "Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading *or in any motion,* so long as the pleading containing such statements has not been superseded by an amendment as provided by Rule 65." Tex. R. Civ. P. 58 (emphasis added). Appellees' joinder in and adoption of King Ranch's summary judgment motion gave appellants notice of the grounds upon which they sought summary judgment. Because of the voluminous exhibits and evidence involved in this case along with the common interest and defenses of the appellees, we perceive no problem with allowing the appellees to adopt and incorporate by reference the grounds for summary judgment alleged by King Ranch.

In support of their contention, appellants cite *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337 (Tex. 1993), which held that, consistent with the precise language of Rule 166a(c), a summary judgment motion "must itself expressly present the grounds upon

which it is made. A motion must stand or fall on the grounds expressly presented in the motion." *McConnell*, 858 S.W.2d at 341. However, the issue of whether a movant can adopt and incorporate by reference the summary judgment grounds alleged by a co-defendant was not before the court, and the court did not condemn this practice as a violation of Rule 166a.

We hold the trial court did not err in allowing the Reynolds to adopt and incorporate, as their grounds for summary judgment, the grounds for summary judgment alleged by their co-defendants. We overrule appellants' first issue.

G. Bill of Review

By their third issue, appellants contend there are fact issues on the elements of their bill of review action. Appellants' bill of review is a direct attack on the agreed judgment signed on April 7, 1883 by the 25th District Court of Nueces County, Texas, in Cause No. 1279, styled *Helen B. Chapman v. Richard King*. Appellants argue the district court's judgment should be set aside because of fraud.

A bill of review is an independent equitable action brought by a party to a previous suit who seeks to set aside a judgment that is no longer subject to a motion for new trial or appealable. *Caldwell v. Barnes*, 975 S.W.2d 535, 537 (Tex. 1998). A party seeking relief from a judgment by bill of review must plead and prove that he or she has a meritorious claim or defense in the original suit. *Transworld Fin. Servs. v. Briscoe*, 722 S.W.2d 407, 408 (Tex. 1987). The petition must allege, factually and with particularity, that the prior judgment was rendered as a result of fraud, accident, or wrongful act of the

opposite party or official mistake, and without any negligence on the part of the plaintiff. *Id.*

Fraud, in relation to attacks on judgments, is either extrinsic or intrinsic, and only extrinsic fraud will support a bill of review. *Id.* Extrinsic fraud is fraud that denied a party the opportunity to fully litigate at trial all the rights or defenses that the party was entitled to assert. *Tice v. City of Pasadena*, 767 S.W.2d 700, 702-04 (Tex. 1989). "Extrinsic fraud is 'collateral' fraud in the sense that it must be collateral to the matter actually tried and not something which was actually or potentially in issue in the trial." *Montgomery v. Kennedy*, 669 S.W.2d 309, 312 (Tex. 1984). "Intrinsic fraud, on the other hand, is inherent in the matter considered and determined in the trial where the fraudulent acts pertain to an issue involved in the original action, or where the acts constituting the fraud were, or could have been litigated therein." *Id.* at 313. An allegation of attorney negligence is not a sufficient ground to support a bill of review. *Transworld*, 722 S.W.2d at 408. A bill of review petitioner who alleges that he suffered an adverse judgment because of the fraudulent or wrongful acts of his attorney is not excused from the necessity of pleading and proving extrinsic fraud on the part of his opponent. *Id.*

1. Extrinsic Fraud

Appellants contend they produced more than a scintilla of evidence to show that Richard King committed extrinsic fraud on Helen Chapman. Appellants assert there is a fact issue regarding whether King committed extrinsic fraud by using Robert Kleberg to subvert the rights of Helen Chapman and her grandchildren. Appellants produced summary judgment evidence that Kleberg subverted their rights by "asserting control over the litigation after Helen's death, failing to give the Chapman

grandchildren notice, falsely stating he could only prove title to half of the Rincon de Santa Gertrudis, falsely stating Rankin was the sole executor, and failing to record the deed from the Lewis estate for over forty years."

Appellees, citing *Transworld*, argue that appellants' reliance on Kleberg's alleged wrongful conduct does not constitute evidence to raise a fact issue sufficient to show that King procured the 1883 Judgment through extrinsic fraud. While the appellees' reliance on *Transworld* is correct, their interpretation of appellants' evidence is incorrect. While appellants tie Kleberg into the fraud they suffered, they do not base their claims solely on him, but rather on the dynamics that existed between Kleberg's concurrent representation of Helen Chapman and Richard King, the actions of each, and their effect on the 1883 consent judgment.

a. *Kleberg's Representation*

Appellants presented summary judgment evidence that Kleberg represented King through the depositions of Bruce Cheeseman and Tom Lea, and a letter written by Kleberg to his parents.

In his deposition, Cheeseman[5] was asked about an article written by Ron George entitled "King and Kleberg fought widow for her half share of King Ranch," published in the Corpus Christi Caller Times on August 23, 1992. In the article, Caleb Coker is quoted as saying:

> Richard King made his ex-partner's widow litigate to the death rather than pay her a penny. . . . And by modern standards, Kleberg should have been disbarred.

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[5] Bruce Cheeseman is the King Ranch archivist and historian.

According to George, "Coker's version sets King Ranch archivist Bruce Cheeseman's teeth on edge, although he doesn't dispute the facts." According to the article, Coker's statement drew the following response from Cheeseman: "Clearly, Kleberg was looking after the interest of his in-state client, versus the interests of his out-of-state client." When Cheeseman was asked in his deposition about this quote, he stated:

> A: I don't recall the quote in that—in that—in that language, no. And I certainly don't agree with his characterization that this matter sets my teeth on edge. I had—I had corresponded and worked with Mr. Coker for a number of years helping him understand this and as—as part of historical scholarship and I think Mr. George to use that phrase "teeth on edge" is a little newspaper sensationalism.
>
> Q: Setting apart "teeth on edge," he quotes you as saying, "Clearly Kleberg was looking after the interest of his in-state client versus the interest of his out-of-state client?"
>
> A: That's what he quotes me as saying, yes.
>
> Q: Clearly looking after King rather than Chapman?
>
> A: That's what he quotes me as saying, yes.
>
> Q: Do you deny making that statement?
>
> A: In that precise language, yes.

In 1951, Tom Lea was commissioned by the King Ranch to prepare an illustrated history of the Ranch to commemorate the centennial of the Ranch's founding in 1853. The resulting two-volume book entitled, *The King Ranch*, contains a recreation of a conversation between Robert Kleberg and Richard King in 1881 in which King

retained Kleberg's legal services for $5000 a year. In 1881, Kleberg was also representing Helen Chapman against King.

In a letter dated July 24, 1881, Robert Kleberg wrote to his parents: ". . . on the way [King] asked us to attend to his legal business for him." In 1881, Kleberg was a partner in the firm of Stayton, Lackey & Kleberg. The record also contains evidence that Kleberg represented King in March 1882 in the case of *Sobrinos v. Chamberlain*, 13 S.W. 634 (Tex. 1890).

b. *Pleadings in Cause No. 1279*

Helen Chapman pleaded that she was the legal and rightful owner of two tracts of land, one being 240 acres patented to W. W. Chapman as assignee of Jeremiah Harrison, and the other being an undivided one-half interest in the Rincon. Half of this undivided one-half interest was conveyed to her husband, William Chapman, by Richard King and his wife. The other half of this undivided one-half interest was purchased[6] at an administration sale from the Estate of Gideon Lewis. She alleged that Richard King on January 7, 1877 entered upon the premises and dispossessed her. She prayed for restitution of those lands, the profits derived from them, and a partition of her one half in the Rincon tract. Her pleadings showed that she was represented by J. W. Slayton, W. Campbell & Givens when the litigation began.

Richard King filed defensive pleadings by his attorneys F. E. MacManus & Pat. O'Doeharty. He first denied the allegations generally, and then pleaded specifically to Mrs. Chapman's charges. King traced his purchase of

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[6] William Chapman and Richard King purchased this property together.

the Rincon. On July 25, 1853, he purchased from the heirs of Juan Mendiola the three and one-half leagues of land known as the Rincon. That on November 11, 1853, he sold an undivided one-half interest to Gideon K. Lewis, and on April 25, 1856, he and his wife sold an undivided one half of his remaining interest in that tract to W. W. Chapman. Richard King acknowledged that he conveyed the one-quarter interest to Chapman, but contended that while the deed of conveyance purports to have been made for the sum and consideration of one hundred dollars, Chapman did not pay to him or his wife the one hundred dollars specified in the deed. King also admitted that in July 1856, he and Chapman bought the one-half interest in the Rincon from the Estate of Gideon Lewis for the sum of $1575 for which King gave his individual promissory note. King denied that Chapman ever paid his portion of the purchase money. He further alleged that Chapman asked to be released from making such payment in consideration of his surrendering to King his right, title, interest, claim, and demand in the land. In his answer, King stated:

> That prior to said suit, to wit: in the latter part of the year 1856, or the early part of 1857, the said W.W. Chapman, who as Quartermaster in the United States Army was, and for a long time before had been, stationed at Corpus Christi, Texas, received orders to go to California. That the said Chapman while engaged in making preparations to go to California, sometime prior to the month of March, 1857, sent a verbal message to this defendant to the effect that from want of means for that purpose he was unable to make the necessary payments on his said pretended purchases of an interest in the said tract of land from this defendant, and his wife on the 25th of April 1856 with him as aforesaid on the

1st of July, 1856, and asking to be released from any further liability for said payments, and that in consideration of such release, he (Chapman) would surrender all his right title and interest in and for the said tract of land to this defendant, and also that he the said Chapman would in a few days write to this defendant to the same effect. That this message was conveyed to this defendant by one J.J. Richardson since deceased. That a short time afterwards the said W.W. Chapman did so write to this defendant, and his letter to the same effect precisely as his aforesaid verbal message and dated some time prior to the month of March, 1857, was received by defendant and the proposition therein contained as aforesaid, accepted and acted upon by this defendant. That in consequence of said verbal message and letter, this defendant paid and caused to be paid on his individual account the whole of the purchase money for the interest of the said Gideon K. Lewis's estate in the said tract of land as aforesaid, and have ever since openly and notoriously treated and regarded the pretended joint ownership of the said Chapman with him in the said tract of land, arising from the deeds aforesaid, as wholly closed and ended.

That the said letter was seen and its contents noted by James Walworth, since deceased, who was then in the employment of this defendant. That said Walworth specially called defendant's attention to said letter, and to the importance of preserving the same. That said letter was accordingly carefully filed away, but that during the confusion incident to a hasty removal of his effects from the ranch of defendant, caused by a raid during the late Civil War, the said letter was lost, and cannot now be

found although diligent search therefore has been continued since the institution of this suit; . . . .

King further pleaded that he gave a promissory note with two sureties to obtain the Lewis deed and executed a mortgage to the administrator, not joined in either by W. W. Chapman, and that King and his sureties were sued on that note in 1860 in the District Court of Cameron County in Cause No. 6401/2, styled *Hamilton P. Bee, administrator, vs. Richard King, Edward Downey, and Milford P. Norton*. King claimed the suit was settled by William G. Hale and Francis J. Parker paying the amount of the debt and King transferring to Hale and Parker a tract of land known as the Santa Rosa.

King's pleadings went into detail as to each of his defenses, but also claimed he sued to confirm his "imperfect and inchoate" title in the disputed tract in May, 1860, as a result of the Board of Land Commissioners having lost all the papers of his original claim as assignee of the heirs of Juan Mendiola. That the suit was pending in Nueces County, Cause No. 580, from May 24, 1860 until April 6, 1868, and during that time no right of intervention was claimed by the Chapmans or anyone for them.

In the final judgment, Mrs. Chapman received title to the 240 acre tract she claimed, as well as an undivided one-fourth interest in the Rincon, which she sold to King in the judgment.

c. *Richard King's Fraud*

The following evidence produced by appellants, coupled with and compared to the pleadings in Cause No. 1279, raises more than a scintilla of probative evidence

to raise a genuine issue of material fact regarding the extrinsic fraud committed by Richard King:

(1) The production of William Chapman's leather-bound account book which sets out the following in 1856:

Land purchased of Capt. King 100.00

Acknowledgment & recording

of deed 4.00

½ of Lewis interest in

Santa Gertrudis 787.50

Chapman's notations in his account book, which was not produced in cause no. 1279, definitely puts into question King's claim that Chapman did not pay him for his share of the Lewis deed.

(2) King was unable to produce the alleged letter written by William Chapman relinquishing to King his land from the Lewis deed.

(3) A letter, dated February 23, 1886, by F. E. MacManus, Richard King's attorney in cause no. 1279, to Richard King's widow, Henrietta King,[7] returning various papers including the original deed from "H. P. Bee administrator of Gideon K. Lewis, of the one-half of 3½ leagues to Richard King, conveyed by him to said heirs, and dated 1st day of August, 1856." King's alleged inability to produce the Lewis deed in 1881 when requested by Helen Chapman is highly questionable when his own attorney was in possession of the deed five years later when it was returned to King's widow.

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[7] Richard King died on April 14, 1885.

(4) The Lewis deed was filed in 1904 by Caesar Kleberg, nephew of Robert Kleberg, as Secretary of the Kleberg Town and Improvement Company. Robert Kleberg was President of the Kleberg Town and Improvement Company. Although King admitted the existence of the Lewis deed in his answer to Helen Chapman's pleadings in cause no. 1279, without the deed as the necessary proof of title, King's allegations that Chapman wanted out of the land purchase and had not paid his share had the potential of bearing more weight before the court in cause no. 1279.

(5) Appellants contend John Rankin, testamentary executor with will annexed, did not have authority to settle cause no. 1279 without an order from the probate court. The record shows that Rankin filed: (a) a petition with the Hon. J. F. Simmons, Presiding County Judge, on November 7, 1882, to have Helen Chapman's will admitted to probate; (b) a bond and oath with the probate court on November 23, 1882; and (c) an inventory of the estate on January 15, 1883. The Texas Revised Civil Statutes, article 1934, required:

> whenever an executor or administrator may deem it for the interest of the estate he represents to purchase property or to exchange any property, or take any claims or property for the use and benefit of the estate in payment of any debt due the estate, or to compound bad or doubtful debts due the estate, or *to make compromises or settlements in relation to property or claims in dispute or litigation, it shall be his duty to present an application in writing to the county court, at a regular term thereof, representing the facts; and if the court upon hearing of such application, shall be satisfied that it will be for the interest of the estate to grant the same, an order*

> *to that effect shall be entered upon the minutes, setting forth fully the authority granted.*

Act of Feb. 21, 1879, 16th Leg., tit. XXXVII, ch. 11 (current version at Tex. Prob. Code Ann. § 234 (Vernon Supp. 2000)). The record contains no evidence: (a) that Rankin applied to the probate court for permission to settle cause no. 1279 and (b) that the probate court authorized Rankin to agree to the consent judgment.

(6) Kleberg's letter of April 23, 1883 to Ellery Brayton, the executor of Helen Chapman's will in South Carolina, which explains cause no. 1279 as follows:

> That the suit of Helen B. Chapman vs. Richard King was disposed of at the last term of our district court which has just closed. John Rankin Executor was made party plaintiff in the suit and judgment was rendered by consent of parties as follows, it was considered by the court that half of the land sued for which was the half of 3½ leagues could be recovered by the plaintiff which would be 3874½ acres—also a tract of 240 acres and in consideration of a moneyed judgment for $5811.75 against the Defendant Richard King—the title was vested to him to the 3874½ acres, and the title to the 240 acres was recovered in favor of the Estate of Helen B. Chapman thus giving Judgment in favor of the Estate for $5811.75 . . . .
>
> This letter shows that the court in cause no. 1279 recognized only the land that Richard King and his wife gave to William Chapman as belonging to Helen Chapman. The court did not recognize William Chapman's one-half interest in the land set out in the Lewis deed. The court's ruling is questionable given the notations in William Chapman's

> account book that he paid for the land and Richard King's inability to produce the alleged letter from William Chapman relinquishing his share of the land.

(7) On November 3, 1880, Stephen Powers of the law firm of Powers & Wells, wrote to Richard King:

> I don't see how you are to get over Mrs. Chapman's title to the Santa Gertrudis interest. Hewlett (?) being dead, and no one _____ to any relinquishment of title by Chapman in his lifetime. It is my advice under these circumstances, to compromise if you can.

Powers's letter recognizes Helen Chapman's title and directly conflicts with Kleberg's claim of inability to prove title to any portion of land bought by William Chapman under the Lewis deed.

The foregoing evidence reasonably puts into question Richard King's claim to the entirety of the land in the Lewis deed, Robert Kleberg's alleged inability to prove Helen Chapman's land title, and Kleberg's legal loyalty to his clients. Therefore, we conclude appellants have produced more than a scintilla of probative evidence to raise a genuine issue of material fact of extrinsic fraud.

H. Limitations

In their fourth issue, appellants contend they presented to the trial court sufficient evidence to raise a genuine issue of material fact that the four-year statute of limitations for their bill of review action was tolled.

A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense. *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748

(Tex. 1999). Thus, the defendant must (1) conclusively prove when the cause of action accrued, and (2) negate the discovery rule, if it applies. *Id.* If the movant establishes that limitations barred the action, the nonmovant must then adduce summary judgment proof raising a fact issue in avoidance of the statute of limitations. *Id.* The determination of when a cause of action accrues is a question of law. *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988).

The residual four-year statute of limitations governs bill of review actions. Tex. Civ. Prac. & Rem. Code Ann. § 16.051 (Vernon 1997); *Caldwell v. Barnes*, 975 S.W.2d 535, 538 (Tex. 1998). In civil cases, the date the court signs a judgment begins the time for filing the documents in connection with an appeal. *Law v. Law*, 792 S.W.2d 150, 153 (Tex. App.–Houston [1st Dist.] 1990, writ denied).

Because appellants have produced more than a scintilla of probative evidence to raise a genuine issue of material fact of extrinsic fraud, we conclude appellants have avoided the four-year statute of limitations for bills of review. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.051 (Vernon 1997); *Caldwell*, 975 S.W.2d at 538; *Defee v. Defee*, 966 S.W.2d 719, 722 (Tex. App.–San Antonio 1998, no pet.); *Lawrence v. Lawrence*, 911 S.W.2d 443, 448 (Tex. App.–Texarkana 1995, writ denied).

Accordingly, we hold the trial court erred in granting appellees' motions for summary judgment as to appellants' bill of review action to set aside the 1883 consent judgment. We sustain appellants' third and fourth issues.

I. Trespass to Try Title

By their second issue, appellants assert in their trespass to try title action[8] that the 1883 Judgment did not bind Helen's heirs because her five grandchildren were not: (1) notified that the court in the 1879 Suit was adjudicating their property rights; (2) notified of the final hearing in the 1879 Suit; (3) notified of the 1883 Judgment; (4) represented by a guardian ad litem, and (5) were not parties to the 1883 Judgment. Appellants contend that appellees are falsely claiming title and the right of possession to their one-half interest of the land in the Lewis deed.

In appellees' motions for summary judgment, appellees characterize the claim of trespass to try title as an allegation "that because Mrs. Chapman's heirs were not made parties to cause no. 1279, the 1883 Judgment is not binding upon them and thus did not adjudicate their rights in the Rincon," or, simply that the judgment in cause no. 1279 did not divest the Chapman grandchildren of their interest in the Rincon; thus, they have superior record title.

Given the evidence reviewed in our determination of the bill of review action, we conclude appellants have produced more than a scintilla of probative evidence to raise a genuine issue of material fact as to their trespass to try title action. Accordingly, we hold the trial court erred in granting appellees' motions for summary judgment on appellants' trespass to try title action. We sustain appellants' second issue.

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[8] A trespass to try title action is a procedure by which rival claims to title or right of possession may be adjudicated. *Yoast v. Yoast*, 649 S.W.2d 289, 292 (Tex. 1983).

J. Adverse Possession

In their fifth issue, appellants contend appellees failed to conclusively prove that adverse possession wiped out the Chapman grandchildren's interest in the Rincon. Appellees assert they have acquired appellants' interest in the Rincon through the ten and twenty-five year adverse possession statutes and that they have "clearly repudiated appellants' alleged interest in the Rincon."

Adverse possession is "an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person." Tex. Civ. Prac. & Rem. Code Ann. § 16.021 (Vernon 1986). A co-tenant may not adversely possess against another co-tenant unless it clearly appears he has repudiated the title of his co-tenant and is holding adversely to it. *Todd v. Bruner*, 365 S.W.2d 155, 160 (Tex. 1963). Notice of repudiation must be communicated to the non-possessory co-tenant either by a declaration of the adverse claim or by acts of such unequivocal notoriety asserting the adverse claim that the non-possessory co-tenant is presumed to have notice of the claim. *Poenisch v. Quarnstrom*, 361 S.W.2d 367, 369 (Tex. 1962). However, when the adverse occupancy and claim of title "is so long-continued, open, notorious, exclusive, and inconsistent with the existence of title in others, except the occupant, the law will raise the inference of notice to the co-tenant out of possession." *Amador v. Berrospe*, 961 S.W.2d 205, 208 (Tex. App.–Houston [1st Dist.] 1996, writ denied).

Whether there has been a repudiation of a non-possessory co-tenant's title is a question of fact. *Walton v. Hardy*, 401 S.W.2d 614, 616 (Tex. Civ. App.–Waco 1966, writ ref'd n.r.e.). Because a fact issue exists as to whether there has been a repudiation of appellants' title in the Rincon, we hold the trial court erred in granting

appellees' motions for summary judgment on the issue of adverse possession. We sustain appellants' fifth issue.

We reverse the trial court's orders granting appellees' motions for summary judgment and remand this case to the trial court for further proceedings.

FEDERICO G. HINOJOSA
Justice

Dissenting Opinion by Justice J. Bonner Dorsey.

Publish. Tex. R. App. P. 47.3.

Opinion delivered and filed this

the 11th day of January, 2001.

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI

No. 13-98-163-CV

WILLIAM WARREN CHAPMAN, III, ET AL.,

Appellants,

—v.—

KING RANCH, INC., ET AL.,

Appellees.

On appeal from the 28th District Court
of Nueces County, Texas.

DISSENTING OPINION

Before Justices Dorsey, Hinojosa, and Chavez

Dissenting Opinion by Justice Dorsey

I respectfully dissent. Appellants seek a bill of review as a direct attack to set aside a consent judgment entered in 1883. They contend that the judgment must be set aside because Richard King and his attorney, Robert Kleberg, committed extrinsic fraud in securing the judgment. The trial court granted a no-evidence summary judgment for the appellee, King Ranch.

For the purposes of this dissent I will briefly outline the origin of the consent judgment. Richard King bought the Rincon in 1853 and sold an undivided one-half interest to Gideon K. Lewis. In 1856, King conveyed to William Chapman an undivided one-half interest in the remaining undivided one-half interest which King owned in the Rincon. Thus King and Chapman each owned an undivided one-fourth interest in the Rincon. Lewis died in 1855, and the administrator of his estate, Hamilton Bee, sold the estate's undivided one-half interest in the Rincon to King and Chapman. In 1856, Bee executed a deed (the Lewis Deed) conveying the property to them jointly. At that point King and Chapman each owned an undivided one-half interest in the Rincon. According to appellants the Lewis Deed was not delivered to Chapman, but was delivered to King, or to King's agents and attorneys. The Lewis Deed was not recorded until 1904. When Chapman died he left his interest in the Rincon to his wife, Helen B. Chapman. Thus she became the owner of an undivided one-half interest in the Rincon.

In 1879, she brought a trespass to try title suit against King (Cause No. 1279) in which she sought to recover title and possession of the undivided one-half interest in the Rincon which she had received from her husband, along with other lands in South Texas. She based her claim on her share of the Rincon on the one-fourth interest deeded by King to Chapman and the one-half interest jointly purchased by King and Chapman from the

Lewis estate. After Helen died John Rankin was substituted as the plaintiff in the suit. Attorney Robert Kleberg represented Rankin in the suit. During the pendency of the suit King hired Kleberg as his attorney. In 1883, the suit was settled, resulting in the consent judgment which appellants now seek to set aside. The consent judgment provided that Helen could only recover a one-fourth interest in the Rincon, that is, one-half of the one-half interest which she had sought to recover from King. The judgment also provided for a sale of that land from Chapman to King and a recovery of other land by Chapman from King.

In the suit now before us King Ranch moved for summary judgment under Rule 166a(i), arguing that there is no evidence to support one or more elements of the bill of review action and that there is no evidence of extrinsic fraud. King Ranch also moved for summary judgment on the grounds that the four-year statute of limitations barred the bill of review action and that the consent judgment barred appellants' claims for trespass to try title and action to quiet title.

Appellants' Response To The Summary Judgment

In their response appellants stated that the essential element of their claim is whether there is evidence that the Estate of Helen B. Chapman was prevented from presenting its meritorious claim in Cause No. 1279 because of extrinsic fraud on the part of Richard King. They asserted that extrinsic fraud occurred when King "corrupted" Robert Kleberg, the attorney of record for the plaintiff in Cause No. 1279, and "together King and Kleberg entered the Consent Judgment."

A trial court must grant a no-evidence summary judgment motion unless the nonmovant produces more than

a scintilla of evidence raising a genuine issue of material fact on the challenged elements. *Design & Fabrication, Inc. v. Pennzoil Caspian Corp.*, 994 S.W.2d 830, 834 (Tex. App.–Houston [1st Dist.] 1999, no pet.). Thus in the context of a no-evidence summary judgment the party with the burden of proof at trial has the burden of proof in the summary judgment proceeding.*See id.* Because appellants failed to produce more than a scintilla of evidence on extrinsic fraud I must dissent.

Bill of Review

The grounds upon which a petitioner can obtain a bill of review are narrow, because the procedure conflicts with the fundamental policy that judgments must become final at some point. *Transworld Fin. Servs. Corp. v. Briscoe*, 722 S.W.2d 407, 407 (Tex. 1987); *Alexander v. Hagedorn*, 226 S.W.2d 996, 998 (Tex. 1950). Generally bill of review relief is available only if a party has exercised due diligence in pursuing all adequate legal remedies against a former judgment and, through no fault of its own, has been prevented from making a meritorious claim or defense by the fraud, accident, or wrongful act of the opposing party. *Wembley Inv. Co. v. Herrera*, 11 S.W.3d 924, 927 (Tex. 1999).

In relation to attacks on final judgments, fraud is classified as either extrinsic or intrinsic, and only extrinsic fraud will entitle petitioners to bill of review relief. *Tice v. City of Pasadena*, 767 S.W.2d 700, 702 (Tex. 1989); *Montgomery v. Kennedy*, 669 S.W.2d 309, 312 (Tex. 1984). The *Montgomery* court stated that:

> extrinsic fraud is that fraud which denies a losing litigant the opportunity to fully litigate his rights or defenses upon trial. Extrinsic fraud is "collateral"

> fraud in the sense that it must be collateral to the matter actually tried and not something which was actually or potentially in issue in the trial. Extrinsic fraud is conduct that prevents a real trial upon the issues involved. Intrinsic fraud, on the other hand, is inherent in the matter considered and determined in the trial "where the fraudulent acts pertain to an issue involved in the original action, or where the acts constituting the fraud were, or could have been litigated therein."

Montgomery, 669 S.W.2d at 312-13.

Richard King's Alleged Extrinsic Fraud

To me the critical issue is whether appellant presented summary judgment evidence to support his claim that Robert Kleberg, the lawyer for the Chapman Estate in the 1879 lawsuit against King, sabotaged his client's case to the advantage of the opponent, Richard King. The only way appellant can avoid the four-year statute of limitations for Bill of Review Actions is by the proof of extrinsic fraud by the opponent, Richard King, in that ancient litigation. The fraud alleged is that King retained Kleberg while he was representing Chapman, and Kleberg, being so employed by King, subverted Chapman's case to King's advantage, necessitating an unfavorable settlement relinquishing Chapman's one-half interest that had been acquired from Lewis.

The majority relies on several pieces of evidence which is claimed constitute probative evidence of King's extrinsic fraud: (1) William Chapman's notations in his leather-bound account book; (2) a letter from Stephen Powers; (3) evidence that King was unable to produce an "alleged" letter written by William Chapman relin-

quishing to King his land from the Lewis Deed; and (4) a letter by King's attorney in Cause No. 1279 to King's widow returning the original Lewis Deed. None of these were mentioned in appellants' Response to the Motion for Summary Judgment, and the trial court's attention was not directed to such evidence to avoid the "no evidence" motion for summary judgment. Fact issues not expressly presented to the trial court shall not be considered on appeal as grounds for reversal. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 676 (Tex. 1979). Our duty is to review the decision of the trial court given the information the judge had at the time of decision. We cannot consider these matters that were not presented to the judge in appellants' response to the motion for summary judgment. Reliance on such by the majority is improper and cannot be a grounds for reversal.

Next, the majority relies on evidence that the missing Lewis Deed was later found and filed in 1904 by King's successors. The inference is that King was hiding the deed to the detriment of Chapman, because without the deed no interest in Chapman could be proven. However, King admitted in his pleadings that he and Chapman jointly bought the property from Lewis's estate and jointly took a deed. That admission in the litigation rendered harmless the absence of the actual deed. The focus of King's defense in the 1879 lawsuit was that Chapman had never paid for his share, and that King had to pay the entirety on threat of foreclosure, and that Chapman let King have the land.

I am unable to see the importance of the missing Lewis deed given those admissions of King. I do not understand how without the missing deed, "King's allegations that Chapman wanted out of the land purchase and had not paid his share had the potential of bearing

more weight before the court in cause no 1279." *See* majority slip opinion at 18.

The majority finds evidence of King's extrinsic fraud in the failure of John Rankin to get authority from the probate court to settle Cause No. 1279. While this may have constituted a defect in the judgment, I can find no argument or authority for the proposition that it voided the judgment to make it subject to collateral attack. This assault is by bill of review, with a four-year limitation period. The judgment was signed in April, 1883, and this action was filed in April, 1995, 112 years later. The failure of the probate court to approve the settlement should have been challenged earlier. There has been no argument in the response to the motion for summary judgment that Kleberg failed to receive approval from the probate judge because he was working at the behest of King.

Assuming Kleberg was acting as Rankin's attorney in the suit, while at the same time on a retainer to Richard King, there is no evidence to show that King "corrupted" or directed Kleberg to prevent Helen Chapman or Rankin from proving title to the undivided one-fourth interest in the Rincon as evidenced by the Lewis Deed.

The settlement of any lawsuit involves many difficult considerations and decisions, especially given the period in which this litigation occurred. At the time of the consent judgment both William and Helen Chapman were dead, as were other alleged witnesses. The Chapman heirs were in South Carolina and were litigating via long distance. The judgment gave the Chapman estate certain lands that King had apparently had the use of for years, and approved a sale of the land to King. The Chapmans did not take nothing by their 1879 lawsuit.

The recitals of summary judgment evidence tending to raise a fact issue were either not presented to the trial

court in appellants' response to the motion for summary judgment or do not amount to any evidence of extrinsic fraud by Kleberg/King against Chapman. I would hold that there is no summary judgment evidence that King or Kleberg committed extrinsic fraud, and therefore, affirm the summary judgment on this issue.

Trespass To Try Title

The majority concludes that based upon the evidence reviewed in their determination of the bill of review action appellants have produced more than a scintilla of probative evidence to raise a genuine issue of material fact concerning their trespass to try title claim. I disagree.

The gist of appellants' argument is that because Helen's grandchildren were not made parties to Cause No. 1279 the consent judgment is not binding upon them, and therefore, did not adjudicate their rights to the Rincon. In 1870, the Texas Legislature passed a statute providing that "[i]f the executor or administrator desires to recover possession merely of real property belonging to the estate, . . . he must bring suit in the District Court, but need not make the heirs parties."[1] This law was effective at the time of the consent judgment. *See East v. Dugan*, 15 S.W. 273, 275 (Tex. 1891) (citing the law).

In *Webster v. Willis*, 56 Tex. 468 (Tex. 1882) the supreme court discussed when heirs could sue to recover property for the estate. The court restated the rule "[t]hat the heirs cannot sue in their own right as heirs for property of the estate; the executor or administrator must sue." *Webster*, 56 Tex. at 473 (quoting *Giddings v.*

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[1] The Act of August 15, 1870, 12th Leg. C.S., ch. 81, § 231, 1870 Tex. Gen. Laws 348.

Steele, 28 Tex. 733, 748 (Tex. 1866)). The court stated that there were two exceptions to this rule, neither of which are applicable here. *Webster*, 56 Tex. at 473 (quoting *Giddings*, 28 Tex. at 748).

Also in 1870 was enacted the following: "In every suit *against* the estate of a decedent involving the title to real estate the executor or administrator, if any, and the heirs shall be made parties defendant.' " Rev. Stat. art. 1202, (Act of Aug. 15, 1870) p. 141. (emphasis added). Interpreting that statute, the supreme court held in *East v. Dugan*, 15 S.W. 273 (Tex. 1891) at p 275, that when a defendant asks for affirmative relief in a suit for land brought by an administrator, the defendant becomes a plaintiff to the extent of such relief, in which case the heirs of the estate suing must be made parties. *Id.* at 275. In *East*, the pleadings of the defendant were not part of the record and the court presumed they sought affirmative relief. However, a general denial does not constitute a request for affirmative relief necessitating the joinder of the heirs. *See Jones v. Gibbs*, 130 S.W.2d 265 (Tex. 1939) and *Jones v. Gibbs*, 130 S.W.2d 274 (Tex. 1939).

In the instant case John Rankin, co-executor of Helen Chapman's Estate, prosecuted the action originally brought by Helen to recover real property belonging to the estate occupied by Richard King. He was not required to join Helen's grandchildren as parties to the suit. *See East*, 15 S.W. at 275. The grandchildren could not sue King to recover the property because the exceptions to the rule announced in *Webster* did not apply to the Chapman Estate. *See Webster*, 56 Tex. at 473. King's pleadings in Cause No. 1279 did not seek affirmative relief from Helen's Estate. King plead generally, and then raised specific defenses, including admitting that the original purchase from the Lewis Estate was made jointly by King and Chapman, but Chapman had

defaulted and King had been sued on the note he alone had given for the purchase.

Although a number of pleas were raised by King, I cannot say he requested affirmative relief from the estate. I would conclude that Rankin was the only person who could sue to recover the property for the estate and that the grandchildren were not required to be made parties to Cause No. 1279. *See East*, 15 S.W. at 275. I would hold that the trial court properly granted summary judgment on appellants' trespass to try title claim. I would affirm the summary judgment.

J. BONNER DORSEY,
Justice

Publish .

Tex. R. App. P. 47.3(b).

Dissenting Opinion delivered and filed

this 11th day of January, 2001.

SUPREME COURT OF TEXAS

No. 01-0430

Argued on April 2, 2003

Opinion Delivered: August 28, 2003

KING RANCH, INC., ET AL.

—v.—

WILLIAM WARREN CHAPMAN, III, ET AL.

On Petition for Review from the Court of Appeals
for the Thirteenth District of Texas

Howard P. Newton, San Antonio, James H. Robichaux, Corpus Christi, Matthews * Branscomb, P.C., Mary Taylor Henderson, Office of the Attorney, Leon Vadim Komkov, Baskin Bennett & Komkov, Carroll G. Martin, Scott Douglass & McConnico, Austin Ketih R. Verges, Mark T. Davenport, Figari Davenport & Graves, LLP,

Dallas, Robert R. Sykes, Midland, J.W. Cooper, Jr., Cooper & Cooper, J.A. (Tony) Canales, Canales & Simonson, P.C., Russell H. McMains, Law Offices of Russell H. McMains, Corpus Christi, J. Scott Carothers, Andrews & Kurth, Gerri M. Fore, Exxon Company, U.S.A., John B. Thomas, Laura B. Rowe, Hicks Thomas & Lolienstern, LLP, Jess H. Hall, Jr., Stacy Lee Williams, Roland Garcia, Jr., Locke Liddell & Sapp LLP, Karen L. Chisholm, Zummo & Mitchell, L.L.P., Houston, Rick Foster, Porter Rogers Dahlman & Gordon, San Antonio, Mike A. Hatchell, Molly H. Hatchell, Hatchell P.C., Tyler, Edward J. Schroeder, The Law Office of Edward J. Schroeder, San Antonio, for petitioners.

John Blaise Gsanger, William R. Edwards, The Edwards Law Firm, L.L.P., Craig S. Smith, Law Office of Craig S. Smith, Michael G. Terry, Hartline Dacus Barger Dreyer & Kern, LLP, Donald B. Edwards, The Law Office of Donald B. Edwards, Corpus Christi, for respondent.

Justice JEFFERSON delivered the opinion of the Court.

Justice ENOCH and Justice O'NEILL did not participate in the decision.

WALLACE B. JEFFERSON, Justice.

Various heirs of Major William Warren Chapman and his wife, Helen Chapman, seek title to an undivided one-half interest in 15,449.4 acres of property, much of it contained within the storied King Ranch in South Texas. The Chapman heirs allege that, in the late 1800s, their fore-

bears' lawyer conspired with Captain Richard King to deprive the Chapman heirs of rightful title to the property. Seeking to avoid an 1883 agreed judgment, they have filed a bill of review and a trespass to try title action. For the reasons set forth below, we reject their claims.

I

Factual Background

A. The Property

Roughly one hundred fifty years ago, the State of Texas issued a patent to the heirs of Juan Mendiola, conveying to them three-and-one-half leagues of land totaling 15,449.4 acres located in Nueces County. These lands were known as the Rincon de Santa Gertrudis. Today, the Rincon includes portions of the King Ranch, the City of Kingsville, and the Kingsville Naval Air Station.

In 1853, the Mendiola heirs transferred their interest in the Rincon to Captain Richard King. Later that year, King conveyed a one-half interest to Gideon Lewis. Three years later, in 1856, King conveyed half of his remaining half interest (i.e. a one-fourth interest) to Major William Warren Chapman, who is the Chapman heirs' ancestor and the source of the title they claim. Lewis died later that year. Hamilton Bee, his administrator, sold the Lewis interest in the Rincon back to King and Chapman jointly for $1,575, for which King gave his individual promissory note. Bee executed a deed accordingly (the "Lewis deed"). At that point, King and Chapman each owned a one-half undivided interest in the property, although the Lewis deed was not recorded until 1904.

B. Cause No. 1279

Major Chapman died testate in 1859, leaving his estate to his wife Helen. Twenty years later, in 1879, she sued King in trespass to try title. The suit, filed in the 25th district court of Nueces County, Texas and bearing Cause No. 1279, sought an undivided one-half interest in the Rincon as well as title to a separate 240 acre property. Helen Chapman alleged that King, her co-tenant, had ejected her from the Rincon on January 1, 1877. Mrs. Chapman was represented by two law firms: M. Campbell & Givens and Lackey & Stayton.[1] By 1881, attorney Robert Kleberg had joined the Lackey & Stayton firm and participated in the representation of Mrs. Chapman.

King, represented by F.E. Macmanus and Pat. O'Doeharty, answered the suit and admitted that the Lewis estate had conveyed Lewis's interest in the Rincon to King and Chapman jointly. King asserted, however, that he acquired title by reason of his exclusive, adverse possession of the Rincon from as early as 1857 and that Major Chapman did not pay for his interest under either the deed between King and Chapman or the Lewis deed. King asserted that Major Chapman verbally and, later, in a letter, surrendered his interest under both deeds to King in forgiveness of his debt for the purchase price, but that the letter was lost when the Union raided the King Ranch during the Civil War. King alleged that he paid the Lewis estate for Chapman's interest, took exclusive possession of the Rincon, took various actions to confirm his title, and "cultivated, used and enjoyed" the land for the three, five, ten, and twenty-year statutory

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[1] In 1881, then Governor Oran Roberts appointed J.W. Stayton associate justice of this Court. Seven years later, Governor Lawrence Sullivan Ross promoted Stayton to Chief Justice of this Court.

periods under the adverse possession statutes then in effect. *See* Act approved Feb. 5, 1841, 5th Cong., R.S., §§ 15-17, 1841 Repub. Tex. Laws 163, 167-68, *reprinted in 2* H.P.N. Gammel, The Laws of Texas 1822-1897, at 627, 631-32 (Austin, Gammel Book Co. 1898).

Helen, who by this time had moved to South Carolina, died in 1881 before the lawsuit concluded. She left her two children a life estate in her interest in the Rincon, and the remainder interest to her five grandchildren. Her will was probated in both South Carolina and Texas by John Rankin, a co-executor appointed by Mrs. Chapman.[2] Rankin was substituted as plaintiff in Cause No. 1279, but none of the heirs was named in or made a party to the case.

On April 7, 1883, four years after suit was filed and twenty-four years after Major Chapman's death, the parties settled Cause No. 1279, and the trial court rendered judgment accordingly. The April 7, 1883 judgment recited:

> [The Chapman Estate] is entitled to recover one half of the land sued for by the plaintiff . . . but that in consideration of the moneyed judgment herein after set out and rendered in favor of the plaintiff and against the defendant Richard King—it is now here, by consent of all the parties hereto,—ordered adjudged and decreed by the Court—that all right title and interest of the said estate of Helen B. Chapman deceased in and to said grant originally made to Juan Mindeola [sic] be vested in Richard King the defendant herein, and that he be quieted in his possession of the said tract of land described in plaintiff's petition. . . . And it is now here further

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[2] The other co-executor, Ellery Brayton, was married to Helen Chapman's daughter.

> ordered adjudged and decreed that plaintiff do now have and recover from the defendant Richard King the sum of Five Thousand Eight Hundred and Eleven Dollars and Seventy Five Cents, $5,811.75 to be paid in four installments of one fourth (1/4) of said aggregate sum each said payments to be made respectively at the expiration of Six (6) months, Twelve (12) months, Eighteen (18) months and Twenty Four (24) months from this date on said aggregate sum at the rate of Ten (10) per centum until paid and should any default be made on the payments of said installments and the interest thereon accrued if any there be, then execution shall at once issue for the entire sum remaining unpaid of said whole amount, and it is further ordered that the defendant herein pay all costs in this behalf expended for which execution may issue.

The judgment also awarded the Chapman estate title to the 240 acre property. There was no appeal.

Sixteen days after the case settled, Kleberg wrote to Ellery Brayton, explaining the agreed judgment:

> That the suit of Helen B. Chapman v. Richard King was disposed of at the last term of our district court which has just closed. John Rankin Executor was made party plaintiff in the suit and judgment was rendered by consent of parties as follows, it was considered by the court that half of the land sued for which was the half of 3 ½ leagues could be recovered by the plaintiff which would be 3874 ½ acres—also a tract of 240 acres and in consideration of a moneyed judgment for $5,811.75 against the Defendant Richard King—the title was vested to him to the 3874 ½ acres, and the title to the 240 acres was recovered in favor of the Estate of Helen B. Chap-

> man thus giving Judgment in favor of the Estate for $5,811.75. . . .

Helen Chapman's son, William B. Chapman, was dissatisfied. In a May 21, 1883 letter to Brayton, Chapman wrote:

> I was opposed to allowing King to take judgment for the property. We only get paid for this one part (?) of it (1/4). For the other part, it is thought that my father paid nothing. It is equally presumptive that neither did King. . . . I don't see why we could not have secured our title . . . if anyone had taken any interest in the matter. I don't think anyone ever attempted to exercise (?) any evidence from [the administrator of the Lewis Estate].[3]

C. King and Kleberg

While Cause No. 1279 was pending, Kleberg's law firm represented King in unrelated matters. In a July 24, 1881 letter to his parents, Robert Kleberg wrote that "[King] asked us to attend to his legal business for him." The Lackey Stayton & Kleberg firm represented King in *Sobrinos v. Chamberlain,* 13 S.W. 634 (Tex. 1890), and *Domingue Rotge v. Richard King.* The Sobrinos case, filed in September 1881, involved a claim against the administrator of the estate of Hiram Chamberlain by a creditor of the estate. The creditor, Jose Sobrinos, alleged that the administrator of the estate, Bland Chamberlain, inappropriately paid certain claims made by King, who was a co-defendant. On March 17, 1882,

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[3] The parties provided transcriptions of some of the ancient, handwritten exhibits in this case. The question marks presumably were inserted by the transcriptionist. The parties do not dispute the accuracy of the transcriptions.

Lackey Stayton & Kleberg made its first appearance in the case, filing an answer on King's behalf. *Rotge v. King,* filed in August 1881, involved a dispute over ownership of cattle. Lackey, Stayton & Kleberg filed an answer on behalf of King in the *Rotge* case in March 1882. The parties do not contend that the subject matter of these two cases related in any way to Cause No. 1279.

In 1885, two years after entry of the consent judgment in Cause No. 1279, Richard King died testate. He left his properties to his wife, Henrietta King. Kleberg became the manager of the King Ranch and, the following year, married Alice King, Richard and Henrietta's daughter. In 1904, Kleberg's nephew recorded the Lewis deed.

D. The King Ranch, by Tom Lea (Little, Brown 1957).

In 1951, the King Ranch commissioned artist and author Tom Lea to prepare an illustrated history of the Ranch to commemorate the centennial of the Ranch's founding in 1853. The resulting two-volume work, entitled *The King Ranch,* contains Lea's fictional account of a conversation in 1881 between Robert Kleberg and Richard King in which King retained Kleberg's legal services for $5000 a year:

Before Kleberg dropped off to sleep, he heard a knock.

He got up, lit a lamp and went to the door. It swung open to reveal the impressive figure of Captain Richard King with his black hat and black beard, his black boots, his watch chain glinting yellow in the lamplight.

Standing uncomfortably self-conscious in his night shirt, the young lawyer said, "Come in, Captain King."

He came in and closed the door.

"Kleberg."

"Yes, Captain King."

"I'm looking for a good lawyer. How would a retainer of five thousand a year suit you?"

Robert Kleberg gulped. "Why-when would that start, sir?"

"Now."

Robert Kleberg gulped again.

"Right now," the captain said. "We will drive out to the Santa Gertrudis."

Lea, The King Ranch 340 (Little, Brown 1957).

E. Caller-Times Article.

On August 23, 1992, the *Corpus Christi Caller-Times* published an article entitled *King and Kleberg Fought Widow for her Half Share of King Ranch.* The article, written by Ron George, contained the following quote attributed to Bruce Cheeseman, a King Ranch archivist and historian: "Clearly, Kleberg was looking after the interest of his in-state client versus the interests of his out-of-state client."

II

The Chapman Heirs' Claims

In 1995, twenty plaintiffs, self-described as the heirs or devisees of the Chapmans, sued some two hundred eight parties, who are alleged to own interests in the Rincon. The Chapman heirs sought a bill of review to set aside the 1883 judgment and asserted an alternative trespass to try title action to regain possession as cotenants. They alleged a conspiracy between King and Kleberg, claiming that the two "connived . . . to advance the interests of Richard King at the expense of the Estate of Helen Chapman." The Chapman heirs also alleged,

based on their status as cotenants, that "all oil and gas leases . . . made after entry of the consent or agreed judgment [in Cause No. 1279] . . . are now here ratified by the said Plaintiffs, entitling Plaintiffs to receive from the present lessee or lessees their proportionate share of all bonuses, delay rentals, royalties, and any other profits due to Plaintiffs. . . ."

King Ranch, joined by most of the other defendants, answered and moved for summary judgment under Rule 166a(c) and (i), Tex.R.Civ.P.[4] The motions asserted that (1) there was no evidence of King's extrinsic fraud or the Chapman heirs' freedom from negligence, two elements essential to the Chapman heirs' bill of review, (2) the action was barred by limitations, (3) the 1883 judgment bound all parties and barred the trespass to try title claim, and (4) King Ranch proved title to the property by adverse possession. The trial court granted the motions.[5]

The court of appeals reversed and remanded, holding (1) there was evidence of extrinsic fraud in the 1883 judgment, (2) the same evidence "avoided the four year statute of limitations for bills of review" and "raise[d] a genuine issue of material fact as to [the Chapmans'] trespass to try title action," and (3) King Ranch's adverse possession claim failed because King Ranch did not

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[4] For ease of reference, the petitioners are referred to collectively as "King Ranch."

[5] The Chapman heirs assert that, after granting King Ranch's summary judgment motion, a subsequent order granting summary judgment to other defendants effectively "ungranted" the first motion, because the second order contained a "Mother Hubbard" clause. We reject this contention. There is no indication that the trial court intended to set aside the first order, *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 205 (Tex. 2001), and a later judgment does not automatically set aside an earlier interlocutory judgment, *Webb v. Jorns*, 488 S.W.2d 407, 409 (Tex. 1972).

establish a repudiation of Mrs. Chapman's title as a matter of law. 41 S.W.3d 693, 704-07.

We granted the petitions for review. 46 Tex. Sup.Ct. J. 394 (Jan. 16, 2003).

III

Attorney Disqualification

Before turning to the issues raised in the petitions for review, we address a preliminary matter. After King Ranch filed its petitions for review, but before they were granted, the Chapman heirs filed several emergency motions asking us to strike King Ranch's petitions for review and remand the case for discovery on whether one of King Ranch's attorneys, Russell McMains, should be disqualified. The Chapman heirs alleged that family member Edward C. Coker revealed privileged information to McMains in the course of a conversation discussing a possible appeal of the trial court's judgment. We abated the petitions and granted the motion to remand on the disqualification issue and directed the trial court to issue findings of fact and conclusions of law. On remand, the trial court scheduled a disqualification hearing.

In response to the Chapman heirs' objections to testimony from McMains allegedly implicating the attorney-client privilege, the trial court ordered that only the Chapman heirs' counsel be present during an in camera examination of McMains. Although it denied the heirs' request to cross-examine McMains during the in camera proceeding, the trial court permitted them to submit written questions to McMains in camera and allowed all parties to examine McMains in open court on matters for which asserted privileges were not at issue. The Chap-

man heirs petitioned us for a writ of mandamus to prevent the in camera examination from going forward or to permit them to cross-examine McMains during that examination. We denied the petition. 45 Tex. Sup.Ct. J. 227 (Dec. 17, 2001).

The trial court found that Coker's testimony was not credible, that he never established an attorney-client relationship with McMains, and that he had not disclosed confidential information to McMains. The court concluded that there was no valid ground to strike the petitions because the Chapman heirs did not meet their burden to establish that McMains was disqualified from representing King Ranch. Based on those findings, we lifted the abatement order and denied the motion to strike. Five months later, in response to the petitions for review, the Chapman heirs complained that the trial court erred in conducting the in camera inspection and that the court reporter failed to transcribe the in camera hearing. The heirs now claim they are entitled to a second disqualification hearing because they are unable to review a transcript of the in camera examination. We note, however, that the Chapman heirs' counsel attended the in camera examination, and the heirs do not contend that evidence presented at the hearing supports their disqualification claim. In any event, their challenges come too late. We ruled on these issues when we denied both the motion to strike and the petition for writ of mandamus. The Chapman heirs did not file a motion for rehearing or any other document seeking review of our rulings until more than five months after we issued them. We decline to revisit those issues.

IV

Standard of Review of No Evidence Motions for Summary Judgment

Because King Ranch's summary judgment motion was, in part, a no-evidence motion, we consider the evidence in the light most favorable to the non-movant. *Wal-Mart Stores, Inc. v. Rodriguez,* 92 S.W.3d 502, 506 (Tex. 2002); *Johnson v. Brewer & Pritchard, P.C.,* 73 S.W.3d 193, 208 (Tex. 2002). A no-evidence summary judgment is essentially a pretrial directed verdict, and we apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed verdict. *See, e.g., Valero Mktg. & Supply Co. v. Kalama Int'l,* 51 S.W.3d 345, 350 (Tex.App.-Houston [1st Dist.] 2001, no pet.); *Blackburn v. Columbia Med. Ctr. Of Arlington Subsidiary,* 58 S.W.3d 263, 270 (Tex.App.-Fort Worth 2001, pet. denied); *Mansfield v. C.V. Bent Tree* Apartment, L.P., 37 S.W.3d 145, 149 (Tex.App.-Austin 2001, no pet.); *Espalin v. Children's Med. Ctr.,* 27 S.W.3d 675, 683 (Tex.App.-Dallas 2000, no pet.); *Barraza v. Eureka Co.,* 25 S.W.3d 225, 231 (Tex.App.-El Paso 2000, pet. denied); *Moore v. K Mart Corp.,* 981 S.W.2d 266, 269 (Tex.App.-San Antonio 1998, pet. denied).

Accordingly, we review the evidence in the light most favorable to the non-movant, disregarding all contrary evidence and inferences. *Merrell Dow Pharms., Inc. v. Havner,* 953 S.W.2d 706, 711 (Tex. 1997). "A no evidence point will be sustained when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a

mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact." *Id.* (citing Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error,* 38 Tex. L. Rev. 361, 362-63 (1960)). Thus, a no-evidence summary judgment is improperly granted if the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact. Tex.R.Civ.P. 166a(i); *Wal-Mart,* 92 S.W.3d at 506. Less than a scintilla of evidence exists when the evidence is "so weak as to do no more than create a mere surmise or suspicion" of a fact. *Kindred v. Con/Chem, Inc.,* 650 S.W.2d 61, 63 (Tex. 1983). More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Merrell Dow Pharms.,* 953 S.W.2d at 711.

With this standard in mind, we turn to the claims made and the evidence adduced in this case.

V

Bill of Review

As outlined above, this is not the first time that Major Chapman's heirs have sued for title to the Rincon. The 1883 judgment in Cause No. 1279 adjudicated the claim over one hundred years ago. To succeed on their current claim to the Rincon, the Chapman heirs must somehow avoid the 1883 judgment quieting title in Richard King. The first claim they allege is a bill of review.

A bill of review is an equitable proceeding to set aside a judgment that is not void on the face of the record but is no longer appealable or subject to a motion for new trial. *Baker v. Goldsmith,* 582 S.W.2d 404, 406 (Tex. 1979); *Schwartz v. Jefferson,* 520 S.W.2d 881, 889 (Tex.

1975). A bill of review is proper where a party has exercised due diligence to prosecute all adequate legal remedies against a former judgment, and at the time the bill of review is filed, there remains no such adequate legal remedy still available because, through no fault of the bill's proponent, fraud, accident, or mistake precludes presentation of a meritorious claim or defense. *Baker,* 582 S.W.2d at 408. The grounds upon which a bill of review can be obtained are narrow because the procedure conflicts with the fundamental policy that judgments must become final at some point. *Alexander v. Hagedorn,* 226 S.W.2d 996, 998 (Tex. 1950); *Crouch v. McGaw,* 138 S.W.2d 94, 96 (Tex. 1940) (noting that a bill of review requires "something more than injustice"). Thus, a bill of review petitioner must ordinarily plead and prove (1) a meritorious defense to the cause of action alleged to support the judgment, (2) that the petitioner was prevented from making by the fraud, accident or wrongful act of his or her opponent, and (3) the petitioner was not negligent. *Alexander,* 226 S.W.2d at 998.

King Ranch's summary judgment motion asserted that there was no evidence of Richard King's alleged extrinsic fraud or the Chapman heirs' lack of negligence, two essential elements of the bill of review. Because the Chapman heirs would bear the burden of proof on a bill of review at trial, they were required to raise a fact issue on each of these elements. Tex.R.Civ.P. 166a(i).

A. Extrinsic Fraud.

Fraud in relation to attacks on final judgments is either extrinsic or intrinsic. Only extrinsic fraud will support a bill of review. *Tice v. City of Pasadena,* 767 S.W.2d 700, 702 (Tex. 1989). Extrinsic fraud is fraud that denied a party the opportunity to fully litigate at

trial all the rights or defenses that could have been asserted. *Id.* Intrinsic fraud, by contrast, relates to the merits of the issues that were presented and presumably were or should have been settled in the former action. *Id.* Within that term are included such matters as fraudulent instruments, perjured testimony, or any matter which was actually presented to and considered by the trial court in rendering the judgment assailed. *Id.* Such fraud will not support a bill of review, because each party must guard against adverse findings on issues directly presented. *Id.; Alexander,* 226 S.W.2d at 998. Issues underlying the judgment attacked by a bill of review are intrinsic and thus have no probative value on the fraud necessary to a bill of review. *Tice, 767* S.W.2d at 702.

Similarly, allegations of fraud or negligence on the part of a party's attorney are insufficient to support a bill of review. *Transworld Fin. Servs. Corp. v. Briscoe,* 722 S.W.2d 407, 408 (Tex. 1987); *Gracey v. West,* 422 S.W.2d 913, 918-19 (Tex. 1968). Thus, a bill of review petitioner who alleges that the wrongful act of his or her attorney caused an adverse judgment is not excused from the necessity of pleading and proving his or her opponent's extrinsic fraud. *Transworld,* 722 S.W.2d at 408.

B. Kleberg's representation of King

The court of appeals held that the Chapman heirs "produced more than a scintilla of probative evidence to raise a genuine issue of material fact of extrinsic fraud." 41 S.W.3d at 705. In so holding, the court of appeals relied on several categories of evidence it found indicative of King's extrinsic fraud. The first such category involved Kleberg's representation of King in the late 1800s. Within that category, the court of appeals cited several pieces of evidence: an 1881 letter from Kleberg

to his parents, Kleberg's representation of King in March 1881 in the *Sobrinos v. Chamberlain* case, the fictional conversation in Tom Lea's two-volume book, and the Cheeseman quote. We address each item in turn.

As set forth above, the 1881 letter from Kleberg to his parents states that King "asked us to attend to his legal business for him." The record confirms that Kleberg's firm represented King in two pieces of litigation unrelated to Cause No. 1279: *Rotge v. King* and *Sobrinos v. Chamberlain.* But simultaneous representation in unrelated matters is not evidence of a fraudulent conspiracy between Kleberg and King. Such dual representation is permissible under today's ethical rules and was not prohibited in the 1880s. *See* Tex. Disciplinary R. Prof'l Conduct 1.06(b), cmt. 11 (noting that "there are circumstances in which a lawyer may act as advocate against a client, for a lawyer is free to do so unless this Rule . . . would be violated"); *Laybourne v. Bray & Shifflett,* 190 S.W. 1159, 1162 (Tex.Civ.App.-Amarillo 1916, no writ) (The "rule prohibiting an attorney once retained by a client from acting for the opposing party applies only in the case of conflicting interest").

The Chapman heirs allege that King paid Kleberg a $5,000 retainer during the pendency of Cause No. 1279 but rely solely on Tom Lea's fanciful account of a conversation between Kleberg and King to support the claim. Lea testified that he could not swear to the accuracy of the of the Kleberg/King conversation. Even if accurate, however, that conversation would not be evidence of extrinsic fraud because the fact that Kleberg may have simultaneously represented King and Chapman in unrelated cases was neither unethical nor fraudulent.

Finally, the Cheeseman quote provides no evidence of extrinsic fraud. Cheeseman denied making this statement

to the reporter, but on review of a summary judgment, we assume the quote is accurate. *KPMG* Peat *Marwick v. Harrison* County *Housing Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). Even if accurate, Cheeseman's statement says nothing about King's actions or intent and cannot support an inference that King committed extrinsic fraud. Instead, it is a historian's opinion—given over one hundred years after the transaction at issue—questioning Kleberg's actions. Kleberg's actions, even if fraudulent, will not support a bill of review. *Transworld,* 722 S.W.2d at 408. In sum, none of the evidence of King and Kleberg's dealings supports an inference that King engaged in extrinsic fraud, because it does not provide "proof of some deception practiced by [King], collateral to the issues in the case, which prevent[ed] the petitioner from fully presenting" claims or defenses in the underlying action. *Bakali v. Bakali,* 830 S.W.2d 251, 255 (Tex.App.-Dallas 1992, no writ).

C. The Lewis deed

The court of appeals next focused on the Lewis deed as evidence of the alleged extrinsic fraud. The court observed that the deed, executed in 1856, was later found in the possession of King and recorded by Kleberg's nephew in 1904. 41 S.W.3d at 704. The court then concluded that "without the deed as the necessary proof of title, King's allegations that Chapman wanted out of the land purchase and had not paid his share had the potential of bearing more weight before the court in cause no. 1279." *Id.* We disagree. In Cause No. 1279, King swore to both the existence and the contents of the Lewis deed. Moreover, under the recording statute, the unrecorded deed was valid and binding on the parties thereto and their heirs. Act approved Feb. 5, 1841, 5th

Cong., R.S. § 21, 1841 Repub. Tex. Laws 163, 169, *reprinted in 2* H.P.N. Gammel, The Laws of Texas 1822-1897, at 627, 633 (Austin, Gammel Book Co. 1898). As Justice Dorsey correctly noted, King's admission rendered harmless the absence of the actual deed. 41 S.W.3d at 709-10 (Dorsey, J., dissenting). Although the trial court subpoenaed the deed for trial, the case was settled and never tried. We cannot surmise that King would have been unable to produce the deed at trial. The Lewis deed and the circumstances of its recording do not provide evidence of King's alleged extrinsic fraud.

D. The Powers Letter

As further evidence of King's extrinsic fraud, the court of appeals points to a November 3, 1880 letter from Stephen Powers of the Powers & Wells law firm, in which he advised Richard King to compromise Cause No. 1279 because "I don't see how you are to get over Mrs. Chapman's title to the Santa Gertrudis interest."[6] 41 S.W.3d at 705. The court held that this statement "conflict[ed] with Kleberg's claim of inability to prove [Chapman's] title" under the Lewis deed. *Id.* Kleberg, however, did not make such a claim in the April 23, 1883 letter to Brayton to which the court of appeals refers. Instead, that letter accurately recounts the terms of the settlement as evidenced by the consent judgment (i.e. that "half of the land sued for" was "considered" as recovered by the estate). It does not identify which half was recovered, nor does it reveal Kleberg's thoughts on the matter. In any event, the decision to settle cannot support an inference that King committed extrinsic fraud.

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[6] Neither Powers nor his firm entered an appearance on King's behalf in Cause No. 1279.

The fact of settlement establishes only that both sides wanted to compromise. By going to trial, the Chapman estate could have lost all. Settlement—particularly a settlement like this one, that awarded the Chapman estate $5,811.75 (over three times what King and Chapman agreed to pay for Lewis's one-half interest in the Rincon thirty years earlier) and title to 240 acres of property—may have been the most prudent course. As Justice Dorsey aptly noted, at the time of the consent judgment, both William and Helen Chapman were dead, and the heirs were litigating via long distance. 41 S.W.3d at 710. We would be remiss in concluding that, under the circumstances of that litigation, this settlement tended to establish a conspiracy between King and Kleberg that provided some evidence of King's extrinsic fraud.

E. Payment for the Rincon

The court of appeals also focused on whether Chapman paid King for the Rincon as evidentiary support of King's alleged extrinsic fraud, holding that notations in William Chapman's account book provided some evidence that Chapman in fact paid King for his share of the land. 41 S.W.3d at 704. But the very question in Cause No. 1279, put in issue by King's sworn answer, was Chapman's alleged nonpayment. In that case, King's wife filed interrogatory answers stating that she and King received "not one cent" from Chapman, and Helen Chapman's interrogatory answers stated that she had no knowledge of King paying any money for the Rincon on behalf of her husband. The parties disagreed on this point, and they settled the matter with the 1883 Judgment. Thus, Chapman's account book—which, in any event, has been continuously in the Chapman family's possession for over 100 years—goes to payment for the

Rincon, a point squarely at issue in Cause No. 1279 and therefore intrinsic to the judgment in that case.[7]

F. Probate Court Approval

Finally, as evidence of Richard King's alleged extrinsic fraud, the court of appeals relied on the absence of evidence that Rankin, co-executor of Helen Chapman's estate, applied for or obtained probate court authority to settle Cause No. 1279. 41 S.W.3d at 704. Even if Rankin was required to do so by statute, the absence of evidence that he did does not impart a sinister motive. We cannot infer from the absence of evidence in a century-old probate court record that King caused Rankin to act without court authority, or that King induced Kleberg to cause Rankin to act without authority. The probate court record appears incomplete; for example, there is nothing indicating that the estate was closed or its assets distributed. In such cases, we apply a presumption, in the absence of evidence, in favor of the judgment. *Baker v. Coe,* 20 Tex. 429, 436-37 (Tex. 1857) (public policy disfavors annulling titles even if the "records did not show a compliance with all the requirements of the law in respect to the disposition of the estates of deceased persons"). "Presumptions must be indulged in favor of such proceedings, especially when they are ancient, and titles have been acquired and transmitted under them, or it would indeed be true that time, instead of healing, as it should, the defects of these titles, would gradually undermine, and eventually destroy them." *Id.* at 437. Accordingly, the absence of evidence of probate court

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[7] We note, too, that the record is devoid of evidence to support court of appeals' statement that the account book, produced by the Chapmans in this litigation, had not been produced in Cause No. 1279.

approval will not support an inference that King committed extrinsic fraud.

Instead, we conclude that "[t]ime, which buries in obscurity all human transactions, has achieved its accustomed effects upon this." *Prevost v. Gratz,* 19 U.S. 131, 133, 6 Wheat. 481, 495 (1821). In this case, the Chapman heirs have cobbled together a series of interesting historical tidbits and Texas folklore in an effort to regain title to one-half of the Rincon—an interest they claim is worth a substantial sum. Viewed separately, each of these tidbits fails to provide evidence of King's extrinsic fraud, and aggregated, they fare no better. While anything more than a scintilla of evidence is legally sufficient to survive a no-evidence summary judgment motion, "some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence." *Browning-Ferris, Inc. v. Reyna,* 865 S.W.2d 925, 927 (Tex. 1993); *Kindred v. Con/Chem, Inc.,* 650 S.W.2d 61, 63 (Tex. 1983) ("When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence."). The Chapman heirs' extrinsic fraud claims are supported, in large part, by the absence of evidence—the dearth of complete records one hundred twelve years after judgment was entered, and the unavailability of any living witness to testify to the events at issue. The heirs urge us to second guess, with benefit of hindsight, the wisdom of settling ancient litigation. We decline to do so. As we recognized in 1857, we must apply a presumption in favor of ancient judgments, particularly those involving land titles, lest the passage of time destroy them. *Baker,* 20 Tex. at 437. We cannot conclude that conspiracy theories—fascinating but unsupported by evidence—may be used to upend a

one hundred twenty year old judgment quieting title to the property. Because the Chapman heirs failed to produce even a scintilla of evidence of Richard King's alleged extrinsic fraud, their bill of review fails.[8]

VI

Trespass to Try Title

The Chapman heirs also filed an alternative trespass to try title action, a procedure by which rival claims to title or right of possession may be adjudicated. *Yoast v. Yoast,* 649 S.W.2d 289, 292 (Tex. 1983). In 1879, Helen Chapman alleged just such a claim in Cause No. 1279. To avoid its effect, the Chapman heirs claim that the judgment is not binding on them because Texas law required Helen Chapman's heirs to be joined as parties in Cause 1279, and nothing in the record demonstrates such joinder. On this point, King Ranch moved for summary judgment on two separate grounds: (1) the judgment was valid without joinder of the minor heirs in Cause No. 1279, and (2) even if the judgment were void due to the non-joinder, King Ranch adversely possessed the property for a sufficient time to acquire title. Without discussing this point, the court of appeals held that the evidence in the record supporting a bill of review also raised a fact issue as to whether the 1883 judgment is void. 41 S.W.3d at 706. In addition, the court of appeals rejected the adverse possession claim, holding that repudiation was a fact issue. *Id.* at 707. We need not decide whether the minor heirs were necessary parties to Cause

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[8] Because the Chapman heirs failed to produce evidence of extrinsic fraud, we need not decide whether there was any evidence of the Chapman heirs' lack of negligence.

No. 1279, because we hold that King Ranch established adverse possession as a matter of law.

Adverse possession is "an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person." Tex. Civ. Prac. & Rem. Code § 16.021 CIV. PRAC. & REM.(1). King Ranch moved for summary judgment on the ten year and the two twenty-five year adverse possession statutes. *See* Tex. Civ. Prac. & Rem. Code § 16.026 CIV. PRAC. & REM.-.28. The first of those twenty-five year prescriptions provides:

> A person, regardless of whether the person is or has been under a legal disability, must bring suit not later than 25 years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who cultivates, uses or enjoys the property.

Id. § 16.027.

The court of appeals correctly noted that a co-tenant may not adversely possess against another co-tenant unless it clearly appears he has repudiated the title of his co-tenant and is holding adversely to it, *Todd v. Bruner,* 365 S.W.2d 155, 156 (Tex. 1963), but it also held that whether there has been a repudiation of a non-possessory co-tenant's title is a question of fact. 41 S.W.3d 707. While we agree that repudiation is often a fact question, when the pertinent facts are undisputed, repudiation may be established as a matter of law. *See Thedford v. Union Oil Co. of Cal.,* 3 S.W.3d 609, 613-14 (Tex.App.-Dallas 1999, pet. denied).

In *Republic Production Co. v. Lee,* 121 S.W.2d 973, 977 (Tex. 1938), we considered the circumstances under

which repudiation may be established between cotenants:

> It is a rule of wide application that if two or more tenants in common of a tract of land enter into a partition of same, and set apart the whole to the exclusion of a non-participating cotenant, such act of partition, when followed by adverse possession, even if wholly void as against the excluded cotenant, constitutes a complete and unequivocal repudiation of the cotenancy relationship. It is also well settled that such a partition, even though there be no sufficient record thereof as will give notice to the excluded cotenant, may be proven as an act manifesting an intention on the part of the participating cotenant to oust the other cotenant or repudiate the tenancy relationship with him.

In *Cryer v. Andrews,* 11 Tex. 170, 180 (Tex. 1853), we faced a similar issue. In that case, a brother died intestate, survived by his siblings and their descendants. Several of those siblings initiated a partition action to quiet title to a piece of property owned by their brother before his death. Mildred Cryer, a sister who was also an heir, was not made a party to the partition action and was not awarded title to any portion of the property. In 1839, the probate court divided the property among the other heirs. Eight years later, Mildred sued for her portion of the land. Her siblings plead adverse possession.

We recognized that the partition judgment was binding only on those parties who were before the court. We also held, however, that

> inasmuch as this partition was a notorious act of ouster, the other parties claiming the whole of the land, to the exclusion of the plaintiff, it would, on

> general principles, as against a citizen not laboring under a disability, operate as the commencement of prescription in favor of all who held adversely, under such decree; and possession under it, accompanied with the circumstances enumerated in the statute, would ripen into a bar against a joint owner thus disseized.

Id. at 181; *see also McCook v. Amarada Petroleum Corp.*, 93 S.W.2d 482, 484 (Tex.Civ.App.-Texarkana 1936, writ dism'd).

In Cause No. 1279, Helen Chapman judicially admitted repudiation, alleging in her original petition "[t]hat on the first day of January A.D. 1877 the Said Richard King entered upon said premises and ejected . . . petitioner therefrom." Even if she had not admitted repudiation in her pleadings, the judgment in Cause No. 1279 itself was a "notorious act of ouster," repudiating any claim of title by Helen Chapman or her heirs by providing that "it is now here, by consent of the parties hereto, ordered, adjudged and decreed by the court, that all the right title and interest in the said grant originally made to Juan Mindeola [sic] be vested in Richard King, the defendant here, and that he be quieted in his possession of the said tract of land described in plaintiff's petition." *See Cryer,* 11 Tex. at 181. If—as the Chapman heirs contend—that judgment was a nullity as to them, the statute continued to run against the heirs notwithstanding their minority. Tex. Civ. Prac. & Rem. Code § 16.027 CIV. PRAC. & REM.; *see also Moody's Heirs v. Moeller,* 10 S.W. 727, 728 (Tex. 1889) (holding that prescriptive period continued against heirs seeking title "notwithstanding any disability of coverture or minority"). As a matter of law, repudiation occurred not later than April 7, 1883, the date the court entered judgment in Cause No. 1279.

King Ranch also produced summary judgment evidence on the remaining elements of adverse possession, establishing as a matter of law that it has cultivated, used, and enjoyed the Rincon for over a hundred years. By holding that a fact issue existed as to whether King Ranch has adversely possessed property it has used openly, notoriously, and exclusively for over one hundred years, despite the undisputed facts of record, the court of appeals ignored our precedent and frustrated the policy behind our adverse possession statutes. *Republic Nat. Bank of Dallas v. Stetson,* 390 S.W.2d 257, 262 (Tex. 1965) ("The policy behind statutes which permit adverse possession is the settlement and repose of titles."); *Wilson v. Daggett,* 31 S.W. 618, 619 (Tex. 1895). Without such laws, "time, instead of lending a helping hand to cure apparent defects and remove opposing claims, will only be the means and afford a ready opportunity of rendering [titles] less secure against mistakes, frauds, and perjuries. The older the title the less secure it becomes against such attacks." *Howard v. Colquhoun,* 28 Tex. 134, 145 (1866). We hold that King Ranch satisfied the requirements of the statute and proved adverse possession of the Rincon as a matter of law.[9]

VII Conclusion

> [T]o permit multiple actions leaves an undesirable uncertainty in the economic affairs of those subject to them. Thus, the social interest in preserving free

[9] Because King Ranch, Inc. established adverse possession as a matter of law, the lessors of the minerals underlying the entire King Ranch, were also entitled to summary judgment on the Chapman heirs' trespass to try title claim, because the Chapman heirs' purported ratification of any mineral lease was without effect.

> marketability of property, recognized in recording and registration acts and in statutes of limitations, can be undermined by allowing repeated litigation of the same title on various grounds existing at the time the first action is brought. It is also unjust to a party who may have made improvements on land in reliance on the first judgment; or worse, it may discourage him from improving his land in the first place.

Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 827-28 (March 1952). This case demonstrates the wisdom in protecting the stability of final judgments. Richard King and William Chapman, along with every witness with personal knowledge of the events at issue, have long since expired. The paper trail of evidence, though surprisingly detailed, cannot turn speculation about King's motives into evidence of his fraud. Assuming we had the ability, more than a century later, to ferret from history facts supporting the Chapman heirs' claim, we must nevertheless presume that, absent extrinsic fraud, the 1883 judgment settled the dispute, once and for all. Even if not settled by judgment, the King Ranch's continued dominion over the Rincon, in a manner obviously hostile to the heirs' claims, establishes adverse possession conclusively.

Accordingly, we reverse the court of appeals' judgment and render judgment that the Chapman heirs take nothing.

IN THE DISTRICT COURT OF
NUECES COUNTY, TEXAS

28TH JUDICIAL DISTRICT

No. 95-2273-A

WILLIAM WARREN CHAPMAN, III, ET AL.,

Plaintiffs,

—v.—

THE KING RANCH, INC., ET AL.

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The Court, having considered the Motions for Summary Judgment filed by Defendants King Ranch, Inc., King Ranch Oil and Gas, Inc.; Defendant Exxon Corporation; Defendants Helen K. Groves, et al.; Defendant Dan Morales, Attorney General of the State of Texas; Defendant Jeannette Holloway as Executrix of the Estate of Richard Gentry Estill, et al.; and Defendant Estate of

Mary E. Fearey (collectively "Defendants"), and having considered the pleadings, the supporting affidavits, the exhibits, other summary judgment evidence, all papers on file, authorities cited by all parties, and arguments of counsel, is of the opinion that the Defendants' Motions for Summary Judgment should be GRANTED and Plaintiffs' Motion for Partial Summary Judgment is DENIED.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that (1) the Defendants' Motions for Summary Judgment be, and the same are hereby GRANTED; (2) Plaintiffs' Motion for Partial Summary Judgment is DENIED; (3) Plaintiffs take nothing of and from the Defendants; and (4) all court costs incurred by Defendants are hereby taxed against Plaintiffs.

IT IS FURTHER ORDERED that all other relief requested by any party in this cause and not expressly granted herein, is DENIED.

SIGNED this 5 day of January 1998.

[ILLEGIBLE]
JUDGE PRESIDING

IN THE DISTRICT COURT OF
NUECES COUNTY, TEXAS

28TH JUDICIAL DISTRICT

No. 95-2273-A

WILLIAM WARREN CHAPMAN, III, ET AL.,

—v.—

KING RANCH, INC., ET AL.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The Court, having considered the Motion for Summary Judgment fled by Defendants Michael Mifflin Reynolds, Individually and as Successor Trustee of the Michael Mifflin Reynolds 1967 M.O.M. Trust and the Michael Mifflin Reynolds 1968 Trust and Katherine Berkley Reynolds, Individually ("Defendants"), and having considered the pleadings, the supporting affidavits, the exhibits, other summary judgment evidence, all papers

on file, authorities cited by all parties, and arguments of counsel, is of the opinion that the Defendants' Motion for Summary Judgment should be GRANTED and Plaintiffs' Motion for Partial Summary Judgment is DENIED.

IT IS THEREFORE ORDERED. ADJUDGED AND DECREED that (1) the Defendants' Motion for Summary Judgment be, and the same is hereby GRANTED; (2) Plaintiffs' Motion for Partial Summary Judgment is DENIED; (3) Plaintiffs take nothing of and from the Defendants; and (4) all court costs incurred by Defendants are hereby taxed against Plaintiffs.

IT IS FURTHER ORDERED that all other relief requested by any party in this cause and not expressly granted herein, is DENIED.

SIGNED this 13th day of Jan, 1998.

[ILLEGIBLE]
JUDGE PRESIDING

[LETTERHEAD OF THE SUPREME COURT OF TEXAS]

November 21, 2003

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RE: Case Number: 01-0430
Court of Appeals Number: 13-98-00163-CV
Trial Court Number: 95-2273-A

Style: KING RANCH, INC., ET AL.

v.

WILLIAM WARREN CHAPMAN, III, ET AL.

Dear Counsel:

Today, the Supreme Court of Texas denied William Chapman, III, et al.s' motion for rehearing in the above referenced cause. Justice O'Neill not sitting.

Sincerely,

ANDREW WEBER
Andrew Weber, Clerk
by Nancy J. Vega, Chief Deputy Clerk

cc: Ms. Cathy Wilborn
Ms. Patsy Perez